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No. 2413

United States
Circuit Court of Appeals

For the Ninth Circuit.

Transcript of Record.

(IN FOUR VOLUMES.)

EDWIN F. MEYER and EMAR GOLDBERG,
Plaintiffs in Error,
vs.

THE UNITED STATES OF AMERICA,
Defendant in Error.

VOLUME IV.
(Pages 1121 to 1500, Inclusive.)

Upon Writ of Error to the United States District Court
of the Western District of Washington,
Northern Division.

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(Testimony of Edwin F. Meyer.)

daily from dealers all over the country, are checked and weighed in the same manner as your shipments, and, while in a few instances shortages have been noted, this is not the rule. Special care will be given your shipments in the future, and it is hoped you will have no [1018—966] cause for complaint. Respectfully, blank Paymaster, U. S. Navy, General Storekeeper. Great Western Smelting & Refining Company, Ninth Avenue South, Seattle, Washington.

Mr. ALLEN.—You said you wrote that letter?

A. Yes, sir.

Mr. MORRIS.—What is the question?

Mr. ALLEN.—I say, I understood he wrote that letter.

A. Yes, sir.

Mr. SHIPLEY.—You dictated that letter personally?

A. Yes, sir, I wrote it, I actually did the physical work here.

Q. After the conversation with Lockwood?

A. Yes, sir.

Q. Was there anything done at that time, or near that time, in regard to testing the scales to ascertain their correctness?

A. Sometime after that Paymaster Spear's attention was called to it, and he ordered that a requisition be prepared for—an order be placed with some expert for testing the scales. I don't know the time, I haven't asked for the folder in that particular case; I didn't think it was necessary.

Q. Are there any other papers in that folder that

(Testimony of Edwin F. Meyer.)

you desire to call to the attention of the jury?

A. No, sir.

Q. Is that the only conversation that you ever had with the witness Lockwood touching this subject matter?

A. I don't recall any other in particular. I made it a rule to visit these storehouses at intervals, and would talk with the storemen in charge of them from time to time.

Q. At the time you received this letter from Mr. Goldberg, or Mr. Goldberg's corporation signed by him, and the time you wrote the reply you read, and had the conversation with the [1019—967] witness Lockwood, were you involved in any conspiracy or any improper scheme or combination with Mr. Goldberg or any of the officers or employees of the Great Western Smelting & Refining Company?

A. No, sir.

Q. Did your actions in regard to the testing of these scales and to the inquiries from Mr. Lockwood have any connection with any improper dealing or association between you and Mr. Goldberg, or any other person?

A. It was a perfectly regular procedure, sir, that would be followed in the course of ordinary handling of the business.

Mr. ALLEN.—Here is that exhibit you were asking for a while ago and couldn't find (handing same to Mr. Morris).

Mr. MORRIS.—We have gone into it so fully, the exhibit, and Mr. Meyer has also explained about sign-

(Testimony of Edwin F. Meyer.)

ing Mr. Spear's name.

Mr. SHIPLEY.—Handing the witness Defendants' Exhibit "A-48," which has just been handed me by Mr. Allen, state whether or not that is the letter to which you referred in your previous testimony in regard to your having written it and signed Paymaster Spear's name to it.

A. Well, the letter was written in the office. I did not write it, that is not my phraseology. The letter was written by a clerk, there and it was put on my desk.

Q. That is the letter you referred to as having signed? A. Yes, sir.

Mr. ALLEN.—How about the signature?

A. I signed Paymaster Spear's name to it.

Mr. SHIPLEY.—Under the circumstances you have previously detailed to the jury?

A. Noting on the face of it "M," Meyer. [1020—968]

Q. You called my attention to the fact the letter was in evidence, the copy of which was just read. Was that exhibit "B"?

The COURT.—Yes, dated January 9th, 1909.

Mr. SHIPLEY.—Mr. Meyer, I will ask you whether, after the requisition was issued regarding a testing of the scales pursuant to instructions by Paymaster Spear, if the scales were regularly tested at that time?

A. They were tested subsequent to that time, yes, sir.

Q. What was the fact with regard to the receipt

(Testimony of Edwin F. Meyer.)

of reports and complaints as to shortages, as alleged, as being improper weights after that?

A. Well, shortages more or less continued. Our people were more accurate, I guess.

Q. Mr. Meyer, calling your attention to Government's witness, Mrs. Coombs, when was it that you lived at Mrs. Coombs' house?

A. I took a room there in the spring of 1906.

Q. And remained there for what length of time?

A. Until about September, or August I think it was, August or September, I don't remember which.

Q. Of what year?

A. 1906, for just a few months.

Q. Who lived with you at that place at that time?

A. My wife.

Q. And did you ever have any conversation with the defendant Goldberg over the telephone at the house of Mrs. Coombs? A. No, sir.

Q. Or from any other residence in the city of Seattle? A. No, sir.

Q. Why did you leave her house?

A. Why, I found her to be a very dangerous woman. [1021—969]

Mr. ALLEN.—Dangerous woman?

A. Yes, sir. She was about to cause a separation between my wife and myself.

Mr. SHIPLEY.—Have you ever had any conversation or any social relations with her, or her family, since your leaving her house?

A. I haven't spoken to her since I moved out, sir.

Q. Mr. Meyer, how long have you known the de-

(Testimony of Edwin F. Meyer.)

fendant Mr. Corder?

A. It may have been about 1905 or 1906; I am positive, sir.

Q. I wish you would describe to the jury what was the nature of your acquaintance and associations, if any, with Mr. Corder, and have been since that time up to the present time?

A. Well, as a representative or agent of the Pacific Engineering Company, he had business with the navy yard, and, like numerous other gentlemen, representatives of these local houses and other houses, he made frequent visits to the Storekeeper's Office, and I became acquainted with him in that way. Our relations have been purely business.

Q. Did you ever have any intimate personal or social relations or acquaintance with him?

A. No, sir, not any more intimate than with hundreds of other representatives of other concerns.

Q. You heard the testimony of the Government's witness, I believe it was a bookkeeper in Mr. Corder's office, in regard to your coming to the office on one or two occasions and going out of the office in company with Mr. Corder. State what the facts in regard to such a visit were.

A. As I remember, I visited Mr. Corder's office or place of business about, or not more than twice—well, it may have been three times; I think probably twice would cover it. On [1022—970] one occasion he wasn't there; on the other occasion he was. I talked with him for a few minutes and we went out together. I think we went probably as far as

(Testimony of Edwin F. Meyer.)

the corner and he went his way and I went mine.

Q. And when was that, approximately?

A. Oh, that was subsequent to this transaction sometime, maybe in 1909 or '10; I don't remember exactly.

Q. What was the occasion of your visit to Mr. Corder's place of business on those two occasions?

A. Well, once I think it was in connection with the delayed deliveries.

Q. What do you mean by that? Explain the facts to the jury.

A. Well, we were writing him—it was in connection with this card system. He had numerous awards upon which the material had not been delivered, and it was necessary from day to day for these clerks to write to him, send him notices of the failure to deliver the material called for in these awards. Now, on one occasion,—his place of business was near the landing of the steamer there, but to the right, about a block out of my way up town—and on one occasion I went, stopped in there to inquire about some of these deliveries. On another occasion I remember going in there for information which I didn't get. It was in connection with some hose couplings. The Navy Department, after hose is worn, condemns it and we dispose or sell the hose and condemn the couplings to the scrap heap. It occurred to me these couplings could be utilized, and I went to get an idea of the value of these couplings in order we might purchase hose without couplings and put the old couplings on the good hose, if possible.

(Testimony of Edwin F. Meyer.)

Q. Was that the occasion of your calling on Mr. Corder?

A. That is one of the occasions, yes, sir. [1023—971]

Q. Was he a dealer in that line of goods?

A. Hose, yes, sir, engineering supplies.

Q. Mr. Meyer, you have referred to delays in deliveries by Mr. Corder's firm. State what that resulted in and what action you personally took in regard to Mr. Corder.

A. Well, these delays were numerous, and I took the matter up with the Storekeeper, who instructed me to ask the Purchasing Pay Office, that is, to put in motion, get this letter started, asking the Purchasing Pay Officer, in view of these delinquent deliveries, to debar the firm of W. A. Corder & Company until they had completed deliveries or otherwise.

Q. What do you mean by "debarring them from bidding"?

A. That is, not to send them any more proposals.

Q. Was this matter taken up with the Department at Washington?

A. The correspondence, as I remember it, was sent over to the Purchasing Pay Officer here. Paymaster Ryan was in charge of the office. He returned it to the Storekeeper with an endorsement to the effect that Mr. Corder—

Mr. SHIPLEY.—State your personal knowledge, Mr. Meyer.

A. The correspondence was returned to the navy yard by the Purchasing Pay Office in Seattle with the

(Testimony of Edwin F. Meyer.)

information that Mr. Corder was bidding on supplies that no one else around here would furnish, or could furnish, and that he was a great deal of assistance to the Purchasing Pay Officer in furnishing material for the navy yard, and that, in the opinion of the office, Mr. Corder should not be debarred.

Q. And what was the action of the Bureau at Washington when your complaints reached there in connection with them or with the report of the Navy Pay Office of this city?

A. Well, when the correspondence was received in the General [1024—972] Storekeeper's Office Paymaster Spear was not satisfied with it, and directed that an endorsement be attached to it and forwarded to the Bureau of Supplies and Accounts at Washington, or to the Commandant, asking a decision of The Bureau of Supplies and Accounts at Washington.

Q. With what result?

A. That the Bureau of Supplies and Accounts at Washington sustained the decision of the Purchasing Paymaster in Seattle.

Q. Mr. Meyer, at the time you caused this complaint to be lodged against Mr. Corder and requested the Department to put him on the black list and debar him from public bidding on the United States Navy Yard at Bremerton, were you engaged in any conspiracy with Mr. Corder, or his concern, to secure business at improper profit, or in any fraudulent scheme, and was this letter written and this action taken in furtherance of any scheme to defraud in connection between yourself and Mr. Corder?

(Testimony of Edwin F. Meyer.)

A. It doesn't ask for any conclusion as to himself, but as to what Mr. Spear did.

Mr. ALLEN.—Answer that by yes or no.

A. No, sir.

Mr. SHIPLEY.—Mr. Meyer, was or was not the original communication calling the attention of the officials to the delinquencies of Mr. Corder, and requesting that he be placed on the black list, initiated by yourself personally?

A. As I remember, the matter was taken up with Mr. Spear personally.

A. By whom?

A. By myself, but I wouldn't initiate a—

Q. I am speaking of the complaint by which the matter was originated. Was that originated by you?

A. The complaint, yes, sir. [1025—973]

Mr. MORRIS.—Did you have something you wanted to explain there?

A. Well, I did, yes, sir.

The COURT.—Explain about what?

A. I was going to say I wouldn't initiate a proceeding of that kind without the direction of the Storekeeper in regard to debarring a contractor from doing business; it is too important a matter for me to initiate without his authority.

Q. I will ask you, Mr. Meyer, if there are any records or files in the possession of the United States Government showing these transactions which you testified about?

A. When I left the navy yard there was in the files of the Storekeeper's office the complete transaction.

(Testimony of Edwin F. Meyer.)

I have tried to get it since and haven't been able to find it, sir.

Q. Calling your attention to the cross-examination of Paymaster Spear, I will ask you if this is the same transaction concerning which Paymaster Spear was interrogated in which he testified that the complaints upon which this action was predicated were made by you to him? A. Same transaction, yes, sir.

Q. Mr. Meyer, outside of the two or three visits or calls of a business character which you made at Mr. Corder's place of business, have you ever at any time called upon him at the city of Seattle?

A. No, sir.

Q. The occasions when you saw him at Bremerton, state whether or not that was in connection purely with Government business, and whether there was anything of an improper character connected with any of those meetings.

A. He called at the office occasionally, as other representatives, for information relative to awards and payments, and frequently [1026—974] saw the Storekeeper.

Q. Mr. Meyer, how long have you been acquainted with the defendant Goldberg?

A. I think since about 1905, 1904—1905, sir.

Q. I wish you would describe to the jury the character of your acquaintance and the extent of it with Mr. Goldberg.

A. Well, Mr. Goldberg visited the yard, I think, during 1904 and 1905 occasionally, and on some of these visits I came in contact with him in an official

(Testimony of Edwin F. Meyer.)

way, got to knowing him in that way. We traveled back and forth on the boat together occasionally, and that was the extent of our acquaintance.

Q. State whether your acquaintance with him was a business acquaintance and association or of a social character.

A. Purely business, sir, purely business. Of course, when we met on the boat we would discuss things.

Q. Did you ever visit at his house?

A. Never, sir.

Q. Did he ever visit at your house?

A. No, sir.

Q. Did you ever accompany him at social gatherings on any occasion here in the city of Seattle?

A. I never have after leaving the boat; always parted there.

Q. Did you ever in your life hear anybody call Mr. Goldberg, or refer to Mr. Goldberg by the name of "Jimmie"?

A. No, sir.

Q. What was your customary mode of addressing Mr. Goldberg?

A. As I address every gentleman, everybody, Mr. I never call anyone by their first name, not even my best friend.

Q. Did you hear the testimony of Mr. Kettlewell in which he swore to this jury that in referring to Mr. Goldberg you made some [1027—975] reference to him as "Jimmie"?

Mr. ALLEN.—I object to that as being an abso-

(Testimony of Edwin F. Meyer.)

lutely misstatement of anything that this record shows. The testimony of Kettlewell was that Corder came in and says, "Why, that man Silverstone is a friend of Jimmie's." He never referred to this man in any way.

Mr. SHIPLEY.—If the Court please, at this time I take exception to the remark of counsel that my question was a misstatement of the fact, and appeal to the record, which shows beyond any question, that Mr. Kettlewell said that this witness Meyer said that Jimmie will be in here, or will do something, referring to Goldberg as "Jimmie," on the 11th day of January, 1908.

The COURT.—Let him answer the question. The jury will remember.

Mr. SHIPLEY.—Did you hear that testimony?

A. I did, yes, sir.

Q. Did Mr. Kettlewell state in this courtroom, or use the expression "Jimmie" with reference to this defendant Goldberg? A. He did, sir.

Q. Was that statement true or false?

A. Absolutely false.

Q. Did you ever in your life refer to Mr. Goldberg by the name of "Jimmie"? A. No, sir.

Q. Mr. Meyer, did you ever, at any of the times as testified by Mr. Kettlewell, or at any time prior or subsequent thereto, ever have any conversation or any communication with the defendant Goldberg of an improper character relative to any business transaction between himself or his concern and the United States Government? A. No, sir.

(Testimony of Edwin F. Meyer.)

Q. Did you ever at any time do any act with the purpose and [1028—976] intention of aiding or assisting either the defendant Corder or Goldberg to perpetrate any fraud, or in furtherance of any improper scheme in connection with their business transactions with the United States Navy Yard?

A. No, sir.

Q. Or for any other purpose? A. No, sir.

Q. Mr. Meyer, you testified in this case relative to and concerning ship requisitions and their form and purposes. I will call your attention to Defendants' Exhibit "V" for identification and ask you to examine that file and state what it is?

A. This is a ship's requisition for supplies for the U. S. ship "Washington." It is not "in excess" of allowance. It is dated June 14th, 1908, at Santa Cruz, California.

Mr. ALLEN.—That in evidence now?

Mr. SHIPLEY.—No, it has only been identified.

Q. This requisition is from what files of what office? A. Yard files, Storekeeper's Office.

Q. At Bremerton? A. Yes, sir.

Q. You recognize that as one of the records of the General Storekeeper's files? A. Yes, sir.

Q. And this was brought into court and identified by Mr. House, was it not, as one of the exhibits?

A. It was.

The COURT.—What is the identification number?

Mr. SHIPLEY.—"V." We ask to have that admitted. It is in regard to the cruiser Washington.

(Testimony of Edwin F. Meyer.)

Mr. ALLEN.—I only object, your Honor, as to its materiality.

Mr. SHIPLEY.—Well, we will connect them up. They are to show the issuance of zinc. [1029—977]

The COURT.—I see, this is June 14th, 1908.

Mr. ALLEN.—I submit, your Honor, the best evidence of issuing of zinc is that card which shows all of the issues of zinc for a period of years.

Mr. SHIPLEY.—Please produce that card. We will show whether that card is the best evidence and shows all of the zinc issued to the satisfaction of this jury before we get through. Does the record show “V” has been admitted?

Mr. ALLEN.—I object to it as being immaterial at this time.

The COURT.—Admitted.

(Papers referred to received in evidence and marked Defendants’ Exhibit “V.”)

Mr. SHIPLEY.—Mr. Meyer, before questioning you in regard to Defendants’ Exhibit “V” I will call your attention to Plaintiff’s Exhibit “H” introduced by the Government in this case. What is that, Mr. Meyer (handing same to witness)?

A. It is a card which we will call a stock card. It is kept with the goods in the storehouse.

Q. State to the jury between what dates Government’s Exhibit “8” shows the issue of zinc?

A. Between March 3d, 1908, and October 9th, 1908.

Q. For what purpose is that card kept in the navy yard?

(Testimony of Edwin F. Meyer.)

A. It is kept by the storeman who handles the material. It shows the expenditures, the receipts and expenditures of the article named, any article named in the yard.

Q. Mr. Meyer, what are the dates again?

A. From March 3d, 1908, to October 9th, 1908.

Q. Isn't there an earlier date than March on that card? A. No, sir. [1030—978]

Q. I will ask you whether nor not—

A. That is the expenditures. Of course,—you are referring to expenditures. December 3d is the date of the card.

Mr. ALLEN.—It is the history of zinc from December 30th? A. December 30th, 1907.

Mr. SHIPLEY.—Covers dates from sometime in December, 1907, up to what time?

A. Yes, sir, up to October 9th, 1908.

Q. Now, Mr. Meyer, I will ask you to state to this jury whether or not that card correctly shows the amount of zinc issued by the Puget Sound Navy Yard to ships of the United States Navy between that date in December, 1907, and—what is the last date? A. And October 9th, 1908.

Q. And October 9th, 1908?

A. Yes, sir it does not show as compiled from the requisitions themselves, that is—

Q. Mr. Meyer, what is the final record, if you know, in the General Storekeeper's Office showing the amount of zinc requisitioned for and delivered?

A. The final record?

Q. Yes, sir, the controlling record?

(Testimony of Edwin F. Meyer.)

A. Is the ship's requisition and the papers that go along with it. This would show, but frequently it doesn't show.

Q. Mr. Meyer, I will call your attention to one item on that card debiting, I think it is the ship "Kearsarge" with 1500 pounds of zinc. Is that a correct record of that transaction from your own personal knowledge?

A. The ship's requisition, which is for the "Kearsarge," called for 1500 zines—

Mr. SHIPLEY.—The simple question is, whether that record is a [1031—979] correct statement of the fact at this time?

A. No, sir, it isn't.

Q. Now, I hand you again Defendants' Exhibit "V," and ask you to turn to that requisition and state what it is and whether or not there is any call on there for zinc?

A. Well, this is a requisition I described a short while ago; it is a Washington requisition, dated June 14th, at Santa Cruz, California, Steam Engineering Department.

Mr. ALLEN.—June 14th what date?

A. 1908, at Santa Cruz, California, for 746 items of stores, item 268 of which is for 2,000—

Q. What is the number of that item?

A. 268, 2,000 pounds boiler zines 12 by 6 inches by $\frac{1}{2}$ inch.

Mr. SHIPLEY.—Mr. Meyer, are there any other items of zinc called for in that requisition?

A. No, sir.

(Testimony of Edwin F. Meyer.)

Q. Mr. Meyer, calling your attention to the cards which are attached to that requisition, what do they show?

A. It shows a transaction—that is, the record of the requisition and the items that have been issued from time to time.

Q. What do you mean by the item that was issued?

A. That is, for the purpose of identification each article required on a requisition is numbered on the left-hand margin, and we call that the item number. That number corresponds to the numbers inserted on the card here (showing).

Q. And for what purpose is that card kept and prepared?

A. For the purpose of keeping a *recorder* track of these. The record order clerk makes these entries on here when the material is issued.

Q. State whether or not those items, giving the item number on [1032—980] this card, are preserved as a record to check against the requisition?

A. Yes, sir.

Q. And when those numbers are shown on that card what does that record indicate?

A. That the material has been issued.

Q. Has been issued, you mean delivered to the ship? A. Delivered to the ship, yes, sir.

Q. What does that record show with regard to the delivery of item 268, the requisition of the ship for zinc? That was the "California," wasn't it?

A. Delivery to the ship by invoice dated August

(Testimony of Edwin F. Meyer.)

18th, 1908, invoice number 704.

Q. What ship was that? A. "Washington."

Q. And that was for how many pounds of zinc?

A. 2,000 pounds.

Mr. ALLEN.—2,000 pounds. Here it is (showing).

Mr. SHIPLEY.—Mr. Meyer, what is the record on Plaintiff's Exhibit "8" as to the issuance of zinc to the ship "Washington"?

A. On the 20th of July—is that requisition 75, please?

Q. Yes. A. 2,000 pounds.

Q. Is that all of the zinc that is shown on that card issued to the ship "Washington"?

A. No, sir, there is another item of 2,000 pounds on April 13th to the "Washington."

Q. Is there any requisition number given to that?

A. Requisition number 47. I have those indexed there for convenience, Mr. Shipley, if you look at my pad in the book. [1033—981]

Mr. SHIPLEY.—If the Court will permit him to step down here and you can turn to that index it will expedite matters.

Mr. ALLEN.—Certainly.

Mr. SHIPLEY.—Handing the witness Defendants' Exhibit "W"—

Mr. ALLEN.—That just identified, Mr. Shipley?

Mr. SHIPLEY.—For identification, I think it is.

Q. What is that, Mr. Meyer?

A. That is another requisition from the ship "Washington," record order 360. It is ship's req-

(Testimony of Edwin F. Meyer.)

quisition number 47, item 10 on that is 2,000 pounds boiler zinc $\frac{1}{2}$ by 6 by 12.

Mr. ALLEN.—Is that going to be offered in evidence?

Mr. SHIPLEY.—Yes, we will offer that in evidence.

Mr. ALLEN.—Let's take a look at it. I have never seen it before in my life. (Examining same.) This is the March delivery?

Mr. SHIPLEY.—What is the date of this delivery?

A. April 13th 1908, on the card here.

Q. Calling your attention to the card that is attached to the ship's requisition, state what that record shows as to whether or not that zinc was in fact delivered.

A. That was delivered the 18th of April, according to the card, sir.

Q. That is, the card attached to the ship's requisition?

A. Yes, sir. That is, when I say it was delivered, the invoice shows.

Mr. ALLEN.—The invoice?

A. Invoice.

Mr. SHIPLEY.—And what do those invoices there show?

A. That the invoices were prepared and priced and delivered to the ship.

Q. To the man who is supposed to get the material.

The COURT.—Any objection to that offer?

(Testimony of Edwin F. Meyer.)

Mr. ALLEN.—I believe not, your Honor.

The COURT.—Admitted.

(Papers referred to received in evidence and marked Defendants' Exhibit "W.")

Mr. SHIPLEY.—Mr. Meyer, calling your attention to Defendants' Exhibit "Y" for identification, examine that.

A. That is the "St. Louis" requisition.

Q. What is the "St. Louis"? A. A cruiser.

Q. What fleet did she belong to?

A. Pacific Fleet.

Q. What is the date of that?

A. April 27th, 1908.

Q. And the requisition number?

Mr. ALLEN.—Mr. Shipley, that isn't in evidence.

Mr. SHIPLEY.—I am going to offer it, I am getting the date so it will be proper to be admitted.

The COURT.—It is already identified.

Mr. SHIPLEY.—We will offer this in evidence, your Honor.

The COURT.—Proceed. Admitted.

(Papers referred to received in evidence and marked Defendants' Exhibit "Y.")

Mr. ALLEN.—Very well, sir.

The COURT.—Proceed.

A. This is the "St. Louis" requisition for supplies not in excess of allowance, dated April 27th, 1908, requisition number 60.

Mr. ALLEN.—That is the "St Louis," now?

A. Item 1, 4,000 pounds boiler zincs 12 inch by 6 inch by 1/2 inch, invoice number 2399. [1035—983]

(Testimony of Edwin F. Meyer.)

Mr. SHIPLEY.—In connection with that requisition, as in Defendants' "V," is there a card attached?

A. Yes, sir.

Q. Showing delivery?

A. Item 1, invoice 2399, 4/30/08.

Q. What does that indicate?

A. That it was invoiced under that number 2399 on that.

Q. What does it mean, it was invoiced; what was done with the zinc?

A. Zinc delivered to the ship and covered by Storekeeper's invoice to the ship.

Q. Is that particular item of delivery indicated on this card, Government's Exhibit "8"?

A. St. Louis, April 30th, 4,000, yes, sir.

Q. And that same amount?

A. Yes, sir, 4,000 pounds.

Q. Now, calling your attention—

Mr. MORRIS.—What is the date, Mr. Meyer?

A. April 27th, is the date of the requisition.

Mr. MORRIS.—What exhibit have you in your hand?

A. Exhibit "Y."

Mr. SHIPLEY.—Calling your attention to Defendants' Exhibit "A-4" for identification—

Mr. ALLEN.—What ship is this, Mr. Shipley?

Mr. SHIPLEY.—That is the ship "St. Louis," is it not, Mr. Meyer?

A. Yes, sir.

Q. The same ship that the last preceeding one re-

(Testimony of Edwin F. Meyer.)

lated to? A. Same ship.

Q. State what that is, and the date of it.

A. Requisition number one from that ship, dated July 22d, 1908, Steam Engineering, not in excess of allowance. [1036—984]

Q. And is there an item of zinc called for in that requisition? A. Yes, sir, item 19.

Mr. SHIPLEY.—We will offer this in evidence, your Honor, as Defendants' Exhibit "A-4."

Mr. ALLEN.—Object to it for the reason heretofore given, your Honor.

The COURT.—Admitted.

(Papers referred to admitted in evidence and marked Defendants' Exhibit "A-4.")

Mr. SHIPLEY.—Mr. Meyer, is there a record attached to this exhibit showing the actual delivery of an item of zinc to the ship based upon this particular requisition?

A. There is an item here of August 3d, 1908, 1,000 pounds. I think that corresponds to that.

Q. Look and see if it does, to be sure.

A. Yes, sir, August 21st, invoice 974, for 1,000 pounds.

Q. Calling your attention to Defendants' Exhibit "A-10" I will ask you what that is.

A. That is another "St. Louis" requisition, dated September 22d, 1908, requisition number 8, for 1424 items of supplies not in excess of allowance.

Mr. SHIPLEY.—Was this ship one of the Pacific Fleet that was to be outfitted during the season of 1908 at the Puget Sound Navy Yard?

(Testimony of Edwin F. Meyer.)

A. Yes, sir.

Mr. SHIPLEY.—We will offer this folder in evidence, your Honor, as exhibit “A-10.”

Mr. SHIPLEY.—Examine that folder, please, Mr. Meyer, and state what it is, and call attention to any item there. [1037—985]

The COURT.—What is that, what exhibit is that?

A. “A-10.”

Mr. SHIPLEY.—Well, I have asked him to refer to any particular item relative to zinc. I didn’t get my question completed.

A. Item 782 is for 1500 pounds of boiler zinc.

Mr. ALLEN.—What ship?

A. “St. Louis.”

Mr. SHIPLEY.—And that was requisitioned for under what date?

A. September 22d, 1908.

Mr. ALLEN.—This, your Honor, is three months after this occurrence.

Mr. SHIPLEY.—And is there a card attached to that ship’s requisition, or any documents, showing the delivery of that particular item of zinc?

A. This requisition is not complete in that the invoice and other correspondence are missing. The article 782 has been checked.

Q. What does that checking indicate?

A. Delivery of the material, invoice 2,093, but the record is not here.

Q. Indicates the delivery to the ship?

A. Yes, sir.

Q. Or the ship’s officers? A. Yes, sir.

(Testimony of Edwin F. Meyer.)

Q. Mr. Meyer, I will ask you a general question which is applicable to all of these ship's requisitions. In some instances there are requisitions in excess and in some there are requisitions not in excess. State in what cases, if any, the authority of the Bureau at Washington had to be obtained to authorize the delivery of the zinc called for in these requisitions.

A. Only in cases where it is "In excess of allowance."

Q. Now, what is this particular requisition you hold in your hand? [1038—986]

A. It is "In excess" requisition.

Q. In that instance no authority previous to delivery was necessary?

A. No authority higher than the ship.

Q. Let me ask you this question now with reference to all of these requisitions: Where the requisition was not "In excess of delivery," was there any authority or discretion lodged in the General Storekeeper's Office, and you as the Chief Clerk in charge at that time to refuse or pass upon the question of whether that amount requisitioned for should be delivered?

A. We delivered it if we had the material; if we didn't have the material—

Q. I say, was there any discretion lodged in you or the General Storekeeper's Office to pass upon the necessities of that particular ship? A. No, sir.

Q. For the supplies requisitioned for?

A. No, sir.

(Testimony of Edwin F. Meyer.)

Q. Mr. Meyer, referring to Plaintiff's Exhibit "8," check that over with the Government's exhibit.

A. That shows on here 1500 pounds.

Q. That delivery is shown on that card?

A. Yes, sir.

Q. Calling your attention to Defendants' Exhibit "XX," state what that is, giving the requisition number and date, and the name of the ship.

A. Requisition 30, U. S. S. "Colorado," dated April 24th, 1908, Steam Engineering, "Not in excess"; Item 6, 6,000 pounds—

Mr. SHIPLEY.—Just a moment, please. We will offer this in evidence at this time. Let the record show the offer at this time of Defendants' Exhibit "XX." [1039—987]

Mr. ALLEN.—Objected to for the same reason and accepted for the same reason.

The COURT.—Admitted.

(Papers referred to received in evidence and marked Defendants' Exhibit "XX.")

Mr. SHIPLEY.—Examine that file, Mr. Meyer—let me ask you this question first: For the purpose of what ship, if any, was that requisition issued?

A. U. S. S. "Colorado."

Q. What was the "Colorado"?

A. A cruiser.

Q. Attached to what fleet? A. Pacific fleet.

Q. Was she one of the ships that you anticipated the necessity of supplying when you caused the requisitions for the purchase of the first 50,000 pounds and the second 50,000 pounds of zinc?

(Testimony of Edwin F. Meyer.)

A. One of the ships, yes, sir.

Mr. ALLEN.—This is the Pacific Fleet?

A. Pacific fleet.

Mr. SHIPLEY.—Pacific Fleet, yes.

A. Item 6, 6,000 pounds boiler zinc 12 by 6 by 1½.

Q. Does that record show or contain any record containing any delivery of that zinc to that ship?

A. Yes, sir.

Q. On what date?

A. Under date of April 25th, 1908, invoice 2,508, 6,000 pounds.

Q. What does Plaintiff's Exhibit "8" show?

A. That it was issued April 25th.

Q. The same amount? [1040—988]

A. Yes, sir.

Q. This was a requisition "Not in excess"?

A. "Not in excess."

Q. And required no authorization from the Bureau at Washington? A. Yes, sir.

Q. I direct your attention to Defendants' Identification A-22. Examine that folder and state what it is record of.

A. U. S. S. "Buffalo," requisition dated December 14, 1907, Steam Engineering requisition "Not in excess of allowance."

Q. Does that requisition show an item of zinc—just to show its materiality is all?

A. Yes, sir, 1,000 pounds, item 37.

Mr. SHIPLEY.—We will offer this exhibit, Defendants' Exhibit "A-22" for identification, in evidence.

(Testimony of Edwin F. Meyer.)

Mr. ALLEN.—Would that show on this card?

A. It doesn't show. I asked for the card preceding this.

The COURT.—Proceed.

(Papers referred to received in evidence and marked Defendants' Exhibit "A-22.")

Mr. SHIPLEY.—Mr. Meyer, I will ask you now to examine this exhibit, state whether or not it discloses the amount of zinc that was requisitioned for, and whether or not that was delivered.

A. Yes, item 37 here shows 1,000 pounds of boiler zinc, and item 37 delivered.

Q. Under what date? A. January 6th, 1908.

Q. In other words, the thousand pounds of zinc to the U. S. ship "Buffalo" was delivered in January what date?

A. January 6th, 1908. [1041—989]

Q. Is the delivery shown on the stock card, Government's Exhibit "8"?

Mr. ALLEN.—A thousand pounds?

A. 1,000 pounds.

Mr. SHIPLEY.—Mr. Meyer, calling your attention to Defendants' Exhibit "Z," and also to Defendants' Exhibit "A-1" for identification, I will ask you whether or not—what those records are, from what office, first; those files are the record of what office?

A. This is detached from "Z." That has no relation to this at all (showing). This "A-1" is a requisition from the "Kearsarge." This detached from another paper.

Mr. SHIPLEY.—At this time we offer in evidence

(Testimony of Edwin F. Meyer.)

Defendants' Exhibit "Z," Exhibit "A-1," Exhibit "A-2," Exhibit "A-3," Exhibit "A-21," Exhibit "A-6," Exhibit "A-7," Exhibit "A-5," Exhibit "A-8."

The COURT.—Same objection to all of them.

Mr. ALLEN.—I understand you offer them all for the same purpose?

Mr. SHIPLEY.—For the same purpose, yes.

Mr. ALLEN.—We object to their materiality.

Mr. SHIPLEY.—I haven't got quite through. And exhibit "A-11" and exhibit "A-9."

The COURT.—Is that all?

Mr. SHIPLEY.—That is all in this connection.

The COURT.—Very well.

Mr. ALLEN.—*Out* objection to all of them, and your Honor has ruled and they are admitted for that purpose?

The COURT.—All of these are admitted. They show a time covering a period as charged here in the indictment.

(Papers referred to received in evidence and marked respectively as follows: Defendants' Exhibit "Z," "A-1," "A-2," "A-3," "A-21," "A-6," "A-7," "A-5," "A-8," "A-11" and "A-9.")
[1042—990]

Mr. SHIPLEY.—Mr. Meyer, calling your attention to exhibit "Z" offered by the defendants, I will ask you with reference to what ship that requisition was issued?

Mr. SHIPLEY.—Calling your attention to the ship's requisition for supplies for the "Kearsarge,"

(Testimony of Edwin F. Meyer.)

what date was that issued?

A. March 20th, 1908, at Magdalena Bay, Mexico.

Q. And what does that record show in regard to a requisition or call for zinc?

A. Has a call here for 1500 sheets of zinc.

Q. What does that show with reference to the delivery? A. Delivered May 2d, 1908.

Q. On May 2d, 1908, as shown by the ship's requisition, how many pounds of zinc was in fact delivered to the U. S. ship "Kearsarge," how many pounds?

A. A copy of the invoice isn't here, but it shows 1500 sheets.

Q. Well, those zines weigh—

Mr. ALLEN.—Just a moment. That is the requisition as it came in?

A. Yes, sir.

Mr. ALLEN.—You have no recollection?

A. I have the record here.

Mr. SHIPLEY.—Mr. Meyer, can you state the quantity of zinc that was delivered to the ship "Kearsarge" under that requisition as compared with the quantity of zinc which is credited upon [1043—991] Government's Exhibit "8."

Mr. ALLEN.—Reading from the exhibit?

Mr. SHIPLEY.—Yes.

A. This exhibit, exhibit "Z," shows that item 207, calling for 1500 sheets of zinc, was delivered to the "Kearsarge."

Mr. ALLEN.—Pardon me. Now, read that to the jury in the way it appears on there.

A. Item 207, 1500 sheets—

(Testimony of Edwin F. Meyer.)

Mr. ALLEN.—No, doesn't it say "S-zinc"?

A. Well, that is a notation made—

The COURT.—Well, read it as it is.

Mr. SHIPLEY.—Read it as it is and then you can make any explanation within your knowledge.

A. 207, unit number; on hand, none; due, none; ditto, required, 1500; notation in pencil, "S."

Mr. ALLEN.—"S" or a "5"?

A. "S"; zincs for boilers.

Mr. SHIPLEY.—Zincs?

A. Zincs for boilers 12 by 6 by $\frac{1}{2}$ inch, unit price 15 cents, total cost \$225.

Q. Mr. Meyer, is the difference of that zinc checked? A. Yes, sir.

Q. In what manner? A. Red pencil.

Q. What do these characters indicate and why were they placed there?

A. By some one of the other clerks, showing that the invoice had been prepared or the stuff issued.

Q. And is there any other record in that file showing that those zincs were in fact delivered?

A. There is a card here which shows that item 207 was issued May 2d, 1908. [1044—992]

Q. Mr. Meyer, can you state to this jury the weight of those zincs, of those dimensions called for under those specifications?

A. The sheets weigh between nine and ten pounds; nearer, ten, approximately ten pounds.

Q. You heard the testimony of Mr. Spear in this courtroom in regard to the weight of the zinc sheets?

A. Yes, sir.

(Testimony of Edwin F. Meyer.)

Mr. ALLEN.—You want the jury to see this notation?

Mr. SHIPLEY.—We will offer it to them at the proper time.

Q. What is this exhibit, please (handing papers to witness)?

A. This is exhibit number “A-1.”

Q. For what ship? A. “Kearsarge.”

Q. Is there an item of zinc shown on that requisition? A. Item 3, 3,000 pounds.

Q. Under what date? A. June 8th, 1908.

Q. Does that record show a delivery of those 3,000 pounds of zinc? A. Yes, sir.

Q. On what date? A. June 9th, 1908.

Q. What was the ship “Kearsarge,” one of the Atlantic Fleet? A. Battleship, yes, sir.

Q. Does Plaintiff’s Exhibit “8” show this same delivery of zinc?

A. Some one took the card away.

Mr. MORRIS.—Here it is (handing same to witness).

Mr. SHIPLEY.—Can you identify it?

Q. Does that record contain a record of the delivery of that zinc?

A. It shows here only 2,000 pounds.

Q. The requisition itself shows a delivery of three?
[1045—993]

A. Yes, of 3,000.

Mr. ALLEN.—Shows a call for three.

A. A call for three, and the item was delivered in full.

(Testimony of Edwin F. Meyer.)

Mr. SHIPLEY.—Speak up loud.

A. It shows a call for three, and the entire amount was checked.

Q. Would that entire amount have been checked if the entire 3,000 pounds had not been delivered to the ship?

Mr. ALLEN.—Now, I submit, your Honor, he can't answer that. These records are made on board the ship, where they may have made errors.

The COURT.—Read the question.

Q. (Question read.)

A. Not complete in that form, no, sir. [1046—994]

EDWIN F. MEYER on the stand, direct examination (resumed).

By Mr. SHIPLEY.—If the Court please, I will try and so frame a general question that will do away with the necessity of detailed questions.

The COURT.—I will be glad if you do that; yes.

Mr. SHIPLEY.—Mr. Meyer, you have been examined concerning ship's requisitions for the use of the U. S. ships "St. Louis," "Colorado," "Washington," "Buffalo" and "Kearsarge." I will ask you, in addition to those requisitions which you have been examined as to, you have examined the requisition in evidence as exhibit "A-2" for U. S. ship "Pennsylvania," the ship's requisition for the U. S. ship "Rhode Island," which is in evidence as exhibit "A-3," the ship's requisition for the U. S. ship "Milwaukee," which is in evidence as exhibit "A-7," for the U. S. ship "Charleston," in evidence as ex-

(Testimony of Edwin F. Meyer.)

hibit "A-5," the ship's requisition for U. S. ship "Tennessee," in evidence as exhibit "A-8," the ship's requisition for the ship "New Jersey," in evidence as exhibit "A-11" and "A-9" and also the entries upon the stock card in evidence as Plaintiff's Exhibit "8," showing the delivery to the U. S. ships "Nebraska," "Princeton" and "Pennsylvania," for the purpose of ascertaining the total amount of zinc requisitioned for the use of those ships mentioned, commencing the month of October, 1907, and extending down and including the month of October, 1908.

A. I have, sir.

Q. State to the jury what the total amount of zinc requisitioned for by those several ships is, as shown on these various exhibits. [1047—995]

A. The aggregate amount as shown by those requisitions which are in evidence here would be over 90,000 pounds.

Mr. SCHLESINGER.—I didn't get that answer.

A. Over 90,000 pounds, as shown by those requisitions here.

Mr. SHIPLEY.—Mr. Meyer, in the exhibits to which you referred, do they include these ships' requisitions plus the allowance—the amount shown to have been withdrawn by three other ships?

A. Yes, sir.

Q. Concerning which there are no ship's requisitions? A. Yes, sir.

Q. Those ships were the "Nebraska," "Princeton" and "Pennsylvania"? A. Yes, sir.

Q. The officers of the Government have been un-

(Testimony of Edwin F. Meyer.)

able to furnish you those requisitions?

A. Yes, sir.

Mr. SHIPLEY.—And we are not questioning, your Honor, the desire of Mr. House, or the Government officials, to furnish these, because we concede they have been very kind, wherever we have requested things they have furnished them, but the fact is they have not furnished these?

A. Yes, sir.

Q. Mr. Meyer, I will ask you to state to the jury what the facts are as to whether or not any of these ships' requisitions for quantities in excess of 5,000 pounds of zinc had been filed in the General Storekeeper's Office prior to the preparation by you of requisition 438, upon which the indictment in this case is based for the purchase of 50,000 pounds of zinc?

Mr. ALLEN.—Are you asking him as to the Atlantic Battleship Squadron?

Mr. SHIPLEY.—Well, any of these ships' requisitions, wherever the evidence shows a requisition for amounts in excess of 5,000 [1048—996] pounds, whether they are the Pacific Fleet or Atlantic Fleet.

A. There are several requisitions, I think, for—

Q. Can you state to the jury what some of those calls for zinc were?

A. Well, "California," 6,000. I don't recall the—

Q. The fact is, these exhibits show a number of calls in excess of 5,000 pounds? A. Yes, sir.

Q. Some of them as high as 8,000?

(Testimony of Edwin F. Meyer.)

A. As high as 8,000. One ship, the "Milwaukee," 10,000 pounds.

Q. Did you have all those facts in your mind, within your knowledge, at the time you prepared this requisition for 50,000 pounds?

A. Yes, sir. I had some of them. The "Milwaukee," of course, was subsequent to the preparation of that requisition.

Q. I will ask you, Mr. Meyer, whether or not it has been possible for the Government to bring into court the stock card which was in use at the navy yard prior to the stock card which is in evidence as exhibit "8"?

A. I asked Mr. House for it, but he said it couldn't be found over at the navy yard.

Q. That is Plaintiff's Exhibit "8" (showing card to witness)? A. Yes, sir.

Q. Mr. Meyer, I wish you would state to the jury the date of your arrest? A. April 8th, 1911.

Q. When was that with reference to the arrest of Mr. Kettlewell?

A. It was ten or eleven days after, eleven or twelve days after, I think it was.

Q. During that interim where were you?

A. The navy yard, General Storekeeper's Office.

Q. Mr. Meyer, at this time I desire to call your attention to the [1049—997] testimony given by Mr. Kettlewell on the witness-stand as a witness for the Government in this case, as shown upon page 3 of the typewritten record of his evidence, which was furnished by the stenographer reporting the evidence

(Testimony of Edwin F. Meyer.)

in this case, and ask you if you heard the following from Mr. Kettlewell in this case. "Answer: I saw Mr. Meyer again, or rather he saw me in the Navy Pay Office along in December, I think it was, of 1907, and I called his attention to the fact that Goldberg had been getting a lot of business, but nothing had been done about it. He says, 'I will see Jimmie,' as he referred to Goldberg, 'and he will come over and see you about it and make it all right.' " Did you hear Mr. Kettlewell so testify before the jury in this case? A. I did, sir.

Q. Were the words "I will see Jimmie" used by Kettlewell as language which he claimed fell from your lips? A. Yes, sir, they were.

Q. Did such a conversation ever take place?

A. Absolutely no.

Mr. SHIPLEY.—You may take the witness.

On cross-examination by Mr. ALLEN said witness testified as follows:

Q. Mr. Meyer, what is your full name, please?

A. Edwin F. Meyer,

Q. How do you spell that last name?

A. M-e-y-e-r.

Q. Has that always been your name, Mr. Meyer?

Mr. MORRIS.—There is one question we want to ask him, Mr. Allen, please.

Mr. SHIPLEY.—Mr. Meyer, will you kindly state to the jury where you are employed at the present time, and have been the greater [1050—998] part of the time since the former trial in this court.

A. Employed with Dam Brothers, with offices in

(Testimony of Edwin F. Meyer.)

Eiler's Building, across the way here.

Q. In the expression Dam Brothers, state whether or not you refer to one of the witnesses who has appeared in court.

A. One of the brothers; yes, sir.

Mr. SHIPLEY.—You may take the witness.

Mr. ALLEN.—Mr. Meyer, was that always your name, Meyer?

A. Meyer was always my name, yes, sir.

Q. Was that name ever Fassemeier?

A. No, sir.

Q. Never was your name? A. No, sir.

Q. You have never changed your name?

A. No, sir.

Q. You never went under this name?

A. No, sir.

Q. Never on any occasion? A. No, sir.

Q. At no time? A. No, sir.

Q. Mr. Meyer, you began your services with the Government back in the year, I believe you stated, 1896 or 7; is that right?

Q. 1896? A. Yes, sir.

Q. Port Royal, in South Carolina, I believe you stated? A. Yes, sir.

Q. You served then continuously in the navy yard of the United States Government through a period from '96 down continuously until the time of your arrest in 1911, I believe; is that right?

A. Yes, sir. [1051—999]

Q. You had then a continuous training and service in the employ of the United States Government in

(Testimony of Edwin F. Meyer.)

the operation of all the different branches in a civilian way of the Navy Yard Office; is that true?

A. Yes, practically true.

Q. You have had, then, a thorough training covering about seventeen or eighteen years at the expense as an employee of the United States Government; that is right, isn't it?

A. Beg pardon, I didn't get the last part of that question.

Q. (Question repeated.)

A. I can't answer as to being at the expense of the Government. I received remuneration for service rendered.

Q. But when you went into the employ of the United States Government you naturally were not conversant with any business forms with which you have since become acquainted?

A. As is the case with all persons, but not at the expense of the Government.

Q. I didn't refer to any improper compensation, you understand; I was referring to the fact of your training in this particular branch of business. Mr. Meyer, after you came to the Puget Sound Navy Yard you served them in the office of the Storekeeper in the city of Bremerton under Mr. Kettlewell as Chief Clerk; isn't that true? A. Yes, sir.

Q. How long did you serve under Kettlewell as your superior in the office?

A. Until December 1st, 1906, I think it was he was transferred, sir.

Q. Through what period of time, then, did you

(Testimony of Edwin F. Meyer.)

serve under Mr. Kettlewell?

A. From 1902, August 10th, until 1906, the first of December, you [1052—1000] were employed as a subordinate to Mr. James A. Kettlewell, who appeared here on the witness-stand; is that true?

A. Yes, sir.

Q. You naturally became quite well acquainted with Mr. Kettlewell?

A. Very well acquainted; yes, sir.

Q. He was your superior officer and you served there with him in the same office for many years?

A. Yes, sir.

Q. That acquaintanceship which began so many years ago, Mr. Meyer, was quite close business as well as a personal relationship, was it not? A. It was.

Q. It was. And that continued down through the period of years, 1904, 5 and 6, and even after Mr. Kettlewell came across the Sound to the Navy Yard Office here, isn't that true, or the Navy Pay Office here? A. Yes, sir.

Q. Those relations were close and personal and friendly, were they not?

A. Yes, sir, broken at times, at intervals.

Q. Broken at times. But even as late as the years 1908, 9 or '10, you were even then in somewhat close relations with Mr. Kettlewell, were you not?

A. Yes, sir.

Q. Upon what occasions and at what times were your relations with Mr. Kettlewell, personal relations with him, ever broken, and for what purpose?

A. Well, at intervals before he left the navy yard

(Testimony of Edwin F. Meyer.)

he owed me some money which he did not pay—

Q. I understand that episode. You referred to it in your direct [1053—1001] examination.

A. Well, you asked me to state—

Mr. MORRIS.—He asked this witness to answer a question.

The COURT.—Let him answer.

A. That was principally the cause; and sometimes some little official matter would occur that would—

Mr. ALLEN.—But this matter of nineteen hundred, this note you referred to of 1902 or 3, that did not disturb—or what was the date of the note?

A. Well, shortly after I came here, sometime in 1902.

Q. At any rate, that note episode, which may have been, according to your version, the disturbing factor—

Mr. ALLEN.—This episode of the note way back in 1902, disturbing as it may have been at the time, according to your version of it, didn't break or jar or terminate the close personal relations between yourself and Kettlewell, did it?

A. As I said, at intervals it came up, but it continued—

Q. Please answer the question. This episode of the note away back in 1902, whatever disturbing factor it may have been at that time, didn't, as a matter of fact, affect later your tranquil close relations with Mr. Kettlewell, did it?

A. You said terminate it. Well, it didn't terminate it, but, I say, there were intervals even up

(Testimony of Edwin F. Meyer.)

till 1908 when it was broken temporarily.

Q. Do you mean to say this note episode is a disturbing factor that runs through 1902 and 3 and 4 and 5, clear down to 1910 or '11?

A. It would cause a broken, strained relation at intervals during that time.

Q. It did? A. Yes, sir. [1054—1002]

Q. This same episode, then, is the cause of these temporary breaks, this note episode?

A. Practically, yes, sir.

Q. Well, then, Mr. Meyer, if that was the cause of any disturbance in your mind, why was it, as late as 1910 and '11, at that time you were going into a business deal, inviting Mr. Kettlewell to go into a business deal with you in regard to a deal over in the Priest Rapids Company?

A. I said at intervals this would come up, but you understand the relation continued at periods.

Q. It wasn't disturbing your mind, then, as late as the year 1910 in April, was it, Mr. Meyer?

A. Well, it may—

Q. Take a look at that letter (handing paper to witness). A. Yes, sir, that is my letter.

Q. That is your letter? A. Yes, sir.

Q. And that is addressed to—

A. Mr. Kettlewell.

Q. I ask that be identified. That is your letter and that is your initial "M" with the cross across it.

A. Yes, sir.

Q. Very commonly sign your name that way, don't you, Mr. Meyer?

(Testimony of Edwin F. Meyer.)

A. Well, that is the sign I used generally.

Q. If you were writing to a close, personal friend, you would probably sign it in that way, would you not?

A. Well, that was the way I used it in the office.

Q. You knew perfectly well that Kettlewell would know from whom that letter came, didn't you?
[1055—1003]

A. Yes, sir. All of the official documents were initialed by me in that manner, "M."

Mr. ALLEN.—We offer this in evidence, your Honor. This is a letter of April 18th, 1910, Plaintiff's Exhibit Number "86," offered for identification.

Mr. MORRIS.—We object to it on the ground it is irrelevant and immaterial. It does not prove or disprove, or throw any light upon the issues involved in this transaction.

The COURT.—What is the purpose of that letter?

Mr. ALLEN.—The purpose of this, your Honor, is to show the fact of the continuing close relations existing from 1904 or 5 between this man and Mr. Kettlewell.

The COURT.—Simply to show the relationship between parties?

Mr. ALLEN.—Yes, sir. This covers the latter part of 1910.

Mr. SCHLESINGER.—On behalf of the defendant, Mr. Goldberg, we object to the introduction of this letter in evidence upon the ground it is long subsequent to the termination of the alleged con-

(Testimony of Edwin F. Meyer.)

spiracy. It is not binding upon him, and in no wise relates to any of the issues involved in this indictment. I haven't even taken the time to read it, but the date is April 18th, 1910. Now, how that can be relative to an indictment that charges an offense with having terminated on June 1st, 1908, I cannot conceive.

The COURT.—The Court has admitted exhibits here on the part of the defendants up as late as the last part of 1910, and that is simply for a certain purpose, and that can be only construed for the purpose of possibly showing relationship between the parties as affecting the credibility of the witness now.

Mr. SCHLESINGER.—What difference would it make what the relation was in 1910? [1056—1004]

The COURT.—I say, as a matter affecting the credibility of the witness with relation to the relationship between himself and Kettlewell.

Mr. SCHLESINGER.—We take an exception, your Honor.

The COURT.—Noted.

Mr. ALLEN.—This is a letter of April 18th, 1910, addressed to Mr. Kettlewell on the letterhead of the Navy Yard, Puget Sound, Washington.

(Letter referred to received in evidence and marked Plaintiff's Exhibit "86." Reading same to jury.)

The COURT.—This, gentlemen of the jury, is admitted only for the purpose of affecting the credibility of this witness with relation to the relations

(Testimony of Edwin F. Meyer.)

existing between him and Kettlewell as testified to, and a possible relationship between the defendant and Kettlewell.

Mr. ALLEN.—If there were any disturbing factors between you and Mr. Kettlewell beginning back even in 1902 or 3, they were sufficiently allayed, so in 1910 you were trying to get Mr. Kettlewell in on this proposition, were you not?

A. No; as I stated before, the relations were broken at intervals, and, of course, they continued until the time of my arrest; but they were broken at intervals.

Q. They were not broken at this time?

A. Not at that particular time, no, sir. And I would like to explain that proposition.

Q. Well, you can tell me any particular time—

Mr. ALLEN.—Mr. Meyer, can you place your finger on any particular time or interval when these kindly, friendly relations were broken, as a matter of fact, some particular month or year, or [1057—1005] something of that sort?

A. Well, I know it was broken for some time shortly before he left the navy yard in 1906, and there were short periods—

Q. Well, designate the short periods; that is what I want.

Q. I don't remember. Some circumstance in connection with the affairs. He is quite ill-tempered at times.

Q. They were matters, then, so light that at this time you can't tell the jury any particular time when

(Testimony of Edwin F. Meyer.)

there was a period, can you?

A. Except I know there was a period for a long time during 1906.

Q. But you can't designate now any particular time when you say you were on unfriendly terms with Mr. Kettlewell or for any particular period of time, can you?

A. Not a great while. We were thrown in contact in a business way, and it was necessary to have intercourse with him in a manner, and naturally any feeling would be eradicated through this business contact.

Q. But you can't pick out any particular time for this jury and tell them?

A. Not after 1906, no, sir.

Q. No. A. No, sir.

Q. Mr. Meyer, you lived for what length of time in the home of Mr. and Mrs. Coombes?

A. A few months—five or six months; I don't remember.

Q. And your relations there were sufficiently close; you all lived in the same rather small dwelling.

A. Small dwelling. I had a room there.

Q. They had a phone in the house?

A. Had a phone in the kitchen; yes, sir. [1058—1006]

Q. When you went to Bremerton in 1906, as I understand it, you lived then in Bremerton continuously how long?

A. I didn't go to Bremerton in 1906, sir.

Q. When did you first move to Bremerton, then?

(Testimony of Edwin F. Meyer.)

Maybe I have the wrong date. A. From Seattle?

Q. Yes, sir.

A. I moved to Bremerton first in 1902, but I came over here afterward and moved back with my wife in 1907—beg pardon—1907, yes, sir, 1907.

Q. I understood you to say in your direct examination that it was 1906 that you moved back there, but I am probably mistaken. A. No, sir.

Q. You moved back there with your wife in 1907?

A. 1907, the latter part of September or first part of October.

Q. Is that when the baby was born?

A. The baby was born in September of that year.

Q. Wasn't there a child born soon after you left the Coombes home?

A. About that time there was a baby born, yes, sir.

Q. You had two children born in successive years?

A. Yes, sir.

Q. I was confused as to that. A. Yes, sir.

Q. Mr. Meyer, you found it possible, living in the city of Seattle, for some time, and even years, to be attached to the Bremerton Navy Yard, living in Seattle, to go over there and perform your duties and do a full day's work and return to the city of Seattle in the evening; isn't that true?

A. Quite a number of years, yes, sir.

Q. In fact, a great number of the employees of the navy yard do that very thing; isn't that true?

[1059—1007] A. Yes, sir.

Q. Then you went over to Bremerton in the fall of 1907. Now, you had been living there about a month

(Testimony of Edwin F. Meyer.)

when Mr. Spear came on the job as Paymaster of the navy yard? A. Oh, several months.

Q. Several months. He came there about the first or second of January, I believe, in 1908?

A. Yes, sir.

Q. During the period from the first or second of January down till the first of April, 1908, did you or did you not, on several occasions, somewhat numerous, as a matter of fact, obtain from Mr. Spear permission to leave your work at the navy yard in Bremerton, giving to him the ostensible reason you wanted to come to Seattle on private business, and remained here during the entire afternoon and evening? A. Oh, I may have on a few occasions.

Q. Well, didn't you on quite a number of occasions, now, refreshing your recollection?

A. Well, possibly later on. My wife was sick during the early part of that year.

Q. Now, Mr. Meyer, I particularly picked out the period of time. I am asking you from January first down till the first day of April, 1908, did or did you not, on different occasions, somewhat numerous in number, request of Mr. Spear, your superior officer, for permission to leave your duty at the navy yard and proceed to Seattle on personal and private business of your own; did you or did you not?

A. I wouldn't say on numerous occasions, no, sir; I did on a few occasions.

Q. On a few occasions? A. Yes, sir. [1060—1008]

Q. How many occasions, then, would you estimate?

(Testimony of Edwin F. Meyer.)

A. Why, that has been five years ago; I don't know.

Q. Well, give us your best recollection.

A. I don't suppose it is more than half a dozen occasions during that period.

Q. But you did, on at least a half a dozen occasions, obtain permission from Mr. Spear, your superior officer, and come to Seattle on business peculiar to your own private affairs; is that right?

A. Yes, I guess it was private business.

Q. Yes, you did that thing? A. Yes, sir.

Q. Then if you did that thing on any one of those evenings you could as well as not called at the office of Mr. Kettlewell in the city of Seattle, could you not? A. I could have, yes, sir.

Q. Were you ever on any occasion in the office of Mr. Kettlewell, in the Navy Pay Office in this city, in the evening when there were other people present in that office? A. Yes, sir.

Q. You have been there? A. Yes, sir.

Q. You have been there on occasions when the two clerks in the office were there?

A. Yes, sir, I met the Paymaster there sometimes.

Q. And you met Mr. Kettlewell there on more occasions, didn't you? A. No, sir.

Q. As a matter of fact, haven't you been up there on a number of occasions when Kettlewell was there and the Paymaster himself was not there? [1061—1009]

A. I don't remember having been there when he was there alone.

(Testimony of Edwin F. Meyer.)

Q. I asked you when the clerks were there?

A. Yes, sir. I would like to explain that.

Q. No, you answer the question.

A. During the latter part of March, or the first of April, my wife went east, and I came over here to live. It was about that time that numerous requisitions were being prepared for the battleship fleet. Mr. Kettlewell wished me to come up occasionally after March 31st, about April 1st, for the purpose of going over these requisitions with him. They were prepared in large number, and there were quite a number of items on it, and some of them he did not understand, and it was after that time that I went up there. My family was east and I was living over here, and I occasionally went up to the office, and I found that the clerk and all were busy working over time there.

Mr. ALLEN.—In Mr. Kettlewell's office?

A. In Mr. Kettlewell's office; yes, sir.

Q. So when you tried to leave the impression, if you did try to do so, with this jury the other day that you didn't call on Kettlewell in his office in the evening, you are mistaken about that? A. No, sir.

Mr. ALLEN.—So your relations with Kettlewell along about this time were quite friendly, were they not?

A. No, sir, I wouldn't say quite friendly. They were relations that would exist between two people in different offices; they were friendly, yes.

Q. Yes, they were friendly on that day.

A. I wouldn't say quite friendly. I might add we

(Testimony of Edwin F. Meyer.)

were both working for the same end, the supplying of those ships. [1062—1010]

Q. Now, during this time, commencing way back in December, down to 1907, down to April 1st, 1908, there was a frequent and continuous boat schedule in effect between the city of Seattle and the city of Bremerton, was there not? A. There was; yes.

Q. And a man could go back and forth without any great inconvenience to himself at all times; isn't that true?

A. Except in the evenings, yes, sir.

Q. Except in the evenings. You mean to say after six or seven o'clock a man couldn't get back to Bremerton?

A. I think the last boat would leave here at 4:30.

Q. But during the day there were numerous boats back and forth? A. Yes, sir.

Q. And if you then were in Kettlewell's office in the evening, you had to stay over in the city?

A. I had to stay over that night, yes, sir.

Q. Now, Mr. Meyer, your counsel examined probably a half day in different directions along different lines with reference to requisitions in the history of the yard. I am not going to take more than about fifteen or twenty minutes on them to cover the same ground. I will ask you if this isn't a fact, that prior to the time which you fix as approximately December 1st, 1907, that prior to that time the different Bureaus in the yard did prepare requisitions for supplies which they in their particular department needed; is that true?

(Testimony of Edwin F. Meyer.)

A. Yes, sir; they prepared requisitions.

Q. Yes, sir, prior to 1907. After 1907, in December, or on the first of January at least, 1908, and after that time, from the time Mr. Spear was personally present there in the yard, was it not a fact that any Bureau or department in the yard which [1063—1011] needed supplies would first direct the inquiry to the office of Mr. Spear and yourself as to whether you had those supplies on hand?

A. Yes, that is true, partly.

Q. That is true partly. As a matter of fact, isn't it true as an absolute rule of the yard there, the entire yard? A. No, sir.

Q. Do you mean to say and tell this jury with the two million stock of goods lying there, that any one of these Bureaus, contrary to a rule existing in the office, would make a requisition for material without first inquiring of the Storekeeper whether or not he had that material on hand?

A. Well, you said the Storekeeper or myself. They would send their representatives to the various storehouses in the navy yard and inquire from the storemen whether these things were there, and would proceed thereafter to prepare the requisitions. The requisitions would lodge—

Q. Very nice, Mr. Meyer.

Mr. MORRIS.—You may finish your answer.

A. (Continuing.) No, sir, they did not apply to the Storekeeper's Office for it in the sense that I think you mean the word. They would go to the storemen around the navy yard for them.

(Testimony of Edwin F. Meyer.)

Q. We will get that clear in a moment. Did not these different departments, after January 1st, 1908, when Mr. Spear came on the job, did they not, as a matter of custom and rule in that yard, either phone or communicate with the office of which you were then Principal Clerk, and ask you in every case whether or not that material was in the yard before they would make the requisition?

A. I would have to inquire from the various storemen and then [1064—1012] transmit the message to them. It would be—it would save time for them to go direct to the storemen.

Q. You haven't yet answered my question.

A. No, sir, they did not.

Q. You mean to say these different departments did not then communicate to your office by phone, more by phone than any other way in the world, and ask you whether or not your Storekeeper's Office had on hand certain material, after January 1st, 1908, that they didn't do that?

A. Well, very frequently they did, but in most instances the first information I would have would be the receipt of the requisition itself.

Q. Very frequently they did phone to you, then?

A. Yes, sir.

Q. You want to qualify your former answer?

A. No, sir, I don't want to qualify it; I didn't say they did not.

Q. As a matter of fact, Mr. Meyer, didn't they phone to you, to your office, either Mr. Spear or yourself, or some other employee of the pay office there

(Testimony of Edwin F. Meyer.)

answering the phone, wouldn't they invariably, if they needed material in any of these departments, phone over and inquire of your department as to whether they had that stock on hand?

A. They did frequently. In most instances I think they went directly to the storehouse where the stock was kept; that would be the source of supply.

Q. When they could go to the head office, without trotting around to half a dozen or a dozen buildings in the yard, and find out by mere inquiry of your office whether you had it on hand, why would they be going to these different buildings to ascertain it?

A. They wouldn't have to trot around; they could use the phone [1065—1013] to these different places just as readily as they could to the office.

Q. You knew and they knew you were charged with the responsibility of having material on hand for these different departments?

A. I wouldn't know at any time what material was on hand. The storemen would have that information.

Q. Wasn't that one of your offices as requisition clerk for that yard, to which you have testified very fully and very freely?

A. The stock was kept in a number of places. They have responsible men in charge of these warehouses. A man wanting material would go to the warehouse to inquire, or call up the warehouse to inquire whether or not this material was there, and not the central office where the papers relative to the purchase were kept. I had no particular means of know-

(Testimony of Edwin F. Meyer.)

ing at any time what material was on hand at the warehouse, except by inquiry from those people.

Q. Do you mean to tell this jury you couldn't go, by looking at your book, your regular ledgers there, and tell in a few seconds as to whether or not your books showed a supply of zinc, we will say, for the purpose of illustration, on hand in the yard?

A. Those books were kept in the bookkeeping office, which was apart from my office. I didn't use that. It would be necessary for me to go into the bookkeeping offices to get that information, which I never did.

Q. Which you never did?

A. For these people.

Mr. ALLEN.—Do I understand they did not or did they, a part of the time, or what percentage of the time did they phone to you in regard to those matters? [1066—1014]

A. I couldn't say as to the per cent of the time, because I would then have to reckon with the time they phoned other people. I know they did phone me several times, or quite a number of times, but it would be necessary for me to get the information from other sources, and if the foreman, or any one of them, would inquire of me, I would tell them to call up such and such a place; if an officer would call I would hesitate to do that and get the information for him.

Q. Isn't it a fact, Mr. Meyer, they would phone to you and ask you if you had the material. If you told them you didn't have the material they would

(Testimony of Edwin F. Meyer.)

ask you and question you as to the estimated cost of that material? A. No, sir.

Q. They never would do that?

A. They did on some occasions, but you are placing that as an absolute fact. They did at some times. What is the probable costs of such and such material, if I had a record of it.

Q. Weren't you the only man on that yard that had been furnished by the United States Government with facilities in the way of books and accounts and the like showing the cost of former purchases by the yard, weren't you the only man in the United States Navy Yard at Bremerton that had that information? A. Absolutely no, sir.

Q. What other people had?

A. The various requisition officers of the various yard departments had that information.

Q. As a matter of fact, hadn't the Storekeeper who is charged with the responsibility of accumulating these vast quantities of supplies, didn't you have there these indexes, as testified to by your own bookkeeper, the indexes within 12 or 15 feet of you [1067—1015] that showed the supply and quantity of every article that you had in the Storekeeper's Office? A. The books showed that; yes, sir.

Q. The books showed that? A. Yes, sir.

Q. And they were kept on this occasion within 12 or 15 feet from your desk; isn't that true?

A. Yes, sir.

Q. If the foreman in some yard wished an engine, or some piece of material of that kind, or if he wished

(Testimony of Edwin F. Meyer.)

a valve of a certain size, he wasn't as familiar with the place in the Storekeeper's warehouse where that material would be kept as you would be in your office; isn't that true?

A. I think they were as familiar as I was, yes, sir.

Q. You think they were? A. Yes.

Q. You think that every department in every part of that big yard knew as thoroughly as you did in your office in which one of these numerous warehouses you kept this material?

A. That wasn't the question you asked me.

Q. Well, I ask you the question now.

A. Well, everyone did not, but the foreman did.

Q. The foreman did, everyone did not?

A. Yes, sir.

Q. So if this man didn't happen to know he would make the inquiry of your office, wouldn't he?

A. Yes, sir.

Q. And if he didn't know he would quite naturally inquire of your office as to the estimated cost of getting that article, if he didn't have it?

A. No, sir, he would not. He would make a call on the requisition [1068—1016] office under the department in which he was connected.

Q. You are trying to lead this jury to believe that even after January 1st, when Mr. Spear came on the yard, that it was the custom of these different departments of the yard to fix the value of the estimate on these requisitions which came through your office?

A. The requisitions that were submitted to the

(Testimony of Edwin F. Meyer.)

General Storekeeper's Office at all times, having been prepared in the respective yard departments, came to the office complete with the estimate and everything else on it.

Q. And do you mean to tell this jury now, as a matter of fact, that estimate was not, in more cases than to the contrary, prepared after conference with you over the phone, by some person in the yard asking you relative to those prices?

A. They did not often confer with me relative to prices.

Q. They didn't often confer with you?

A. No, sir.

Q. They did sometimes, though?

A. They did at times, yes, sir, but not often.

Q. Mr. Meyer, wasn't it a matter of complaint, when Mr. Spear came to the office, that you were carrying a great deal of this matter in your head, isn't that true—isn't that the reason for the card system which followed?

A. Not a matter of complaint. I complained about the lack of help there, and it was necessary to carry it. There was no one to do it; I was forced—

Q. Didn't Mr. Spear tell you if you died that information wasn't available to anybody else with regard to these figures? A. I don't recall that.

Q. Or words to that effect. [1069—1017]

A. I don't recall that.

Q. Or words to that effect?

A. I don't recall anything like that. I knew just as soon as I was relieved from these multifarious

(Testimony of Edwin F. Meyer.)

duties I began the installation of that card system.

Q. Mr. Barnes was responsible for that card system, wasn't he, now, as a matter of fact?

A. No, sir.

Q. Anyway, it came there after Mr. Barnes got there?

A. Well, because I was relieved from this work, from these duties at that time.

Q. Now, Mr. Meyer, after Mr. Spear arrived on the yard there was in use there rules in your office, his office, governing every clerk in the office, including yourself, that any matter of a particular importance which was to be brought to his personal attention, or which required his personal attention, should have a memorandum or little slip attached with a note to that effect, was there not?

A. I know of no rule to that effect. I did it before he came there and I did it after he came there.

Q. That was a custom, then, before and after he came on the yard?

A. That was the custom before and after he came there.

Q. It was followed, then, down through Mr. Spear's experience there until the red card system was adopted; is that true? A. Yes, sir.

Q. Then from 1908 down to, well, we will say, down to the latter part of the same year, there was this white slip in vogue? A. Yes, sir.

Q. And later they inaugurated the red system?

A. Yes, sir. [1070—1018]

Q. All requisitions for stock, Mr. Meyer, were

(Testimony of Edwin F. Meyer.)

prepared in the office of the General Storekeeper; is that right? A. No, sir.

Q. Substantially all, or practically every requisition for stock, for articles known as stock articles, were instituted and prepared in your office; isn't that true? A. No, sir.

Q. It isn't true? A. No, sir.

Q. What percentage of the cases, then, was that not true?

A. Well, very frequently the yard departments would want material for various jobs in anticipation or for some already authorized job. They would prepare these requisitions; they would prepare it for more than they actually wanted and would submit it to the Storekeeper.

Mr. ALLEN.—The Storekeeper's yard and office and buildings had accumulated there stock of value of something over a million dollars, had they not, Mr. Meyer, at this time?

A. About that time I think there was.

Q. Just about that time?

A. I think probably about a million.

Q. Pig iron, lead, bronze, or the hundreds, as you have stated, 25,000 articles, or possibly more than that, were articles which were continuously kept in the buildings controlled by the Storekeeper, were they not?

A. In the buildings, yes, sir. Sometimes in the open.

Q. Those were catalogued and were known as stock articles; isn't that true? A. Yes, sir.

(Testimony of Edwin F. Meyer.)

Q. Then as regards the stock articles, this particular kind to which I refer, which would include zinc plate, Mr. Meyer, I [1071—1019] believe, as regards those stock articles there kept in the yard, was it not your duty as requisition clerk under Mr. Spear to keep that stock up, and for all deliveries to be made, or increases to be made in the articles, you were expected to prepare the requisitions?

A. Yes, sir.

Q. That is true?

A. That is true, with some exceptions.

Q. But that is substantially true?

A. Substantially true, yes, sir.

Q. Zinc plates 12 by 6 by $\frac{1}{2}$ inch is a stock article, isn't it? A. It is a stock article.

Q. Now, there was a great deal said by you in regard to the preparation of these requisitions. You were the officer, subordinate officer to Mr. Spear, charged with the responsibility of either personally preparing, or seeing that they were properly prepared, every requisition that went out of there for stock articles; is that true?

A. Yes, sir, that is substantially true.

Q. As a matter of practice in your office, Mr. Meyer, I will ask you whether you did not personally prepare with your own hands, running it off on the typewriter, many of these requisitions for stock articles?

A. At what period are you referring to now?

Q. Commencing at January 1st, 1908, down through the spring and summer, and, say, to the

(Testimony of Edwin F. Meyer.)

first of August?

A. I did prepare a few, yes, sir; I think very few.

Q. You think very few.

Q. As a matter of fact, didn't you prepare a great number of them personally?

A. No, I don't think I did, sir. [1072—1020]

Q. You don't think you did?

A. I had too much other work to do.

Q. You had too much other work to do. When you did not personally prepare them with your own hands upon the machine, I will ask you whether it isn't true that you would take a blank form of the requisition, such as we have had many here in evidence, and, with a pencil, write out the figures and the amounts, and all the data necessary for use on that requisition, and then personally hand it to Mr. Dam, or whoever your assistant might have been at your right or left?

A. I did in some instances, yes, sir.

Q. Well, that is a very general statement. Well, as a matter of fact, didn't you do that in practically every instance except those where you handed them personally yourself?

A. No, sir, I did not. I prepared a little slip, but not a copy of the requisition. It was on the form of a little memorandum or slip. I think several of them were seen here the other day.

Q. Do I understand you would either personally prepare these requisitions or you would prepare on a little slip, or occasionally perhaps use the form of requisition itself, would that be the system?

(Testimony of Edwin F. Meyer.)

A. Yes, sir, and sometimes I would tell the clerk to do it, if it happened to be convenient.

Q. Then if you did not prepare them yourself. if they were prepared by this subordinate under you and by him filed out, they were then returned to your desk and inspected by you before they went to the desk of Mr. Spear; is that right? A. Yes, sir.

Q. In other words, you furnished the data and the information for these requisitions; isn't that true? [1073—1021]

A. Yes, sir, substantially; it came through me.

Q. Well, you would supply, then, the amount of the material which you wanted, the pounds and the like, you would supply as well the date of delivery which you proposed, and you would supply, then, as well the estimated cost; is that true?

A. In most instances, yes, sir.

Q. In most instances that is true? A. Yes, sir.

Q. Then when this matter came back to your desk you would go over these requisitions to see they were properly filled out in form and the like; is that true? A. Substantially true.

Q. Substantially true?

A. Of course, if I were to check over every item of his work it would require as much time to do that as it would the actual preparation of the papers. I would only give it a casual inspection, that is, to see it was in proper form.

Q. You were responsible for it, weren't you?

A. So was the clerk who prepared it.

Q. But you were the responsible officer, you were

(Testimony of Edwin F. Meyer.)

the responsible party, you furnished the amount, the total number to be purchased and the like, weren't you a responsible officer?

A. Following the same out, you might say the man who prepared it was responsible, also responsible the Storekeeper and the Bureau and the Secretary of the Navy.

Q. But you were the man who stated to this jury you furnished the number of pounds, you furnished the number of days, you furnished the estimated price, didn't you, to this clerk?

A. In many instances I did, yes, sir, in a great number of instances.

Q. That was your duty, wasn't it, as requisition clerk, Mr. Meyer, [1074—1022] to do that thing?

A. I was not requisition clerk at that time; I performed the work of requisition clerk.

Q. All right, we will make that distinction. You prepared the work of the requisition clerk at that time? A. Yes, sir.

Q. And the work of the requisition clerk required him to do that thing; isn't that true?

A. Yes, sir.

Q. So whether the requisition was prepared by you personally, or whether it was written on a memorandum sheet or paper and actually and physically written by someone else, it would then come back to your office for inspection? A. Yes, sir.

Q. And then if you found it correct it went to the desk of Mr. Spear; is that right? A. Yes, sir.

Q. A great deal has been said, Mr. Meyer, with

(Testimony of Edwin F. Meyer.)

reference to the custom of inspection and the practice of inspection in this yard. When any material was delivered at the wharf of the navy yard at Bremerton, what was the next step down after it was landed upon the wharf?

A. Well, the next step, in the ordinary course of business, would be to have it moved, have the material moved to where it was required in the navy yard. If the material was an emergency it was very frequently inspected on the wharf; if not, it was taken up into the various buildings of the navy yard, wherever the material was to be stored, and there held for inspection. If it was small articles it would be taken up and inspected in the inspection room. We had a room, or part of the storehouse [1075—1023] reserved for inspection.

Q. A great deal, Mr. Meyer, has been said about this Inspection Call. From what point did the Inspection call originate?

A. In the requisition office by the Inspection Call Clerk.

Q. In the requisition office? A. Yes, sir.

Q. Didn't it, as a matter of fact, the Inspection Call, didn't you notify them the material was there and the Inspection Call came from your department?

A. That is exactly what I said, sir, the requisition office.

Q. There is a requisition office somewhere, I understand? A. In the Storekeeper's Office.

Q. There is another requisition office somewhere?

(Testimony of Edwin F. Meyer.)

A. Requisition offices at that time in all of the yard departments.

Q. Well, in other words, there originated, then, out of your hands, after the materials were landed on the dock there, an Inspection Call to inspect that material; isn't that true?

A. By the Inspection Call Clerk it was prepared. We have a clerk called the Inspection Call Clerk.

Q. As a matter of fact, that man was working directly under you, wasn't that true?

A. Yes; yes, as all clerks in the office.

Q. Well, he was working directly under you and whatever was done in the matter you knew it, as a matter of fact?

A. Well, generally I knew. I knew what his work was, that he should prepare it in form, but as far as the various numerous departments, it was simply a matter of routine.

Q. Mr. Meyer, when this Inspection Call went out, it required, then, the services of two commissioned officers of the United States Navy and one of the non-commissioned officers of the [1076—1024] yard; isn't that true?

A. Well, that was a Board of Inspection as it was constituted.

Q. Mr. Meyer, state to the jury how many commissioned officers were in the service, if you know, at the United States Navy Yard in the spring of 1908?

A. Well, there were commissioned officers in charge of the various departments.

(Testimony of Edwin F. Meyer.)

Q. About ten or twelve, weren't there, as a matter of fact?

A. I don't think there were as many as that.

Q. You don't think there were so many as that?

A. No, sir, I don't think there were as many as that.

Q. How many employees of all kinds were there in the yard about this time?

A. Quite a large number, I think.

Q. 1500? A. Maybe 2,000.

Q. 1500 to 2,000? A. Yes, sir.

Q. Then these different commissioned officers who are charged with the primary responsibility of conducting that yard, had, each one of them, practically some department under his control, didn't he?

A. Yes, sir.

Q. Each of these men, who was a busy man, was he not, he had numerous duties to perform?

A. Should have been.

Q. Well, as a matter of fact, their duties were such they were busy men; isn't that true?

A. I can't say they were; I think they really ought to have been.

Q. So, as a matter of fact, upon these so-called Inspection Calls, [1077—1025] upon which two officers' names would appear, there was a subordinate, as a matter of fact. And tell the jury, isn't it the truth and isn't it the fact that this Inspection Call, calling for two senior officers and one subordinate officer, it generally resolved itself down to the fact of the subordinate officer walking over and looking

(Testimony of Edwin F. Meyer.)

at the material, possibly personally checking it to see that it weighed out as regards the requisition, and examining it as to quality, and then coming back and reporting that fact to you; isn't that true?

A. No, sir, they never came back and reported the fact to me.

Q. As a matter of fact, isn't that the way it was generally done in the yard?

A. Of course, you have the written regulations here.

Q. Now, pardon me; I am not asking you about the regulations, I am asking you about the practice of this yard.

A. I can tell you from my observation what I thought went on, what I saw.

Q. Isn't what you saw what I have just described to the jury?

A. Just a second, sir. The Inspection Call, all these Inspection Calls would be sent from our office to the office of the Board of Inspection. The Inspection Call Clerk over in that office would give those calls to some of these junior officers that you have mentioned for the purpose of having him perform the inspection. He would take with him some of the foremen in the navy yard and they would perform the inspection. The—

A. (Continuing.) The Board thereafter took all of these papers together and would walk around the navy yard to the various places where the stuff was, and looked it over and then took the papers to the

(Testimony of Edwin F. Meyer.)

office and filled them out, whatever the quantity was.
[1078—1026]

Q. The responsibility, Mr. Meyer, of really checking this up, then, due to the crowded conditions of the yard, was chiefly reposed upon a subordinate officer who was not a commissioned officer?

A. He was a warrant officer, yes, sir. I am giving you merely my opinion of it.

Q. Your observation, yes, that is all I want.

A. Yes, my observation.

Q. We are not criticizing them; that is a bad condition there—

A. The regulation provided afterwards—

Q. But that was the condition prevailing there and necessary under the circumstances apparently. The Inspection Board, then, passed upon two things. Isn't it a fact that this Inspection Board had nothing whatever to do with the price of the article?

A. Absolutely nothing, sir.

Q. Absolutely nothing. This Inspection Board, then, would simply do two things, they would pass upon the quantity or weight of the article, and they would pass upon the quality according to specifications, isn't that true?

A. That is their function, yes, sir.

Q. That is their function. They weren't supposed to check up in any way the cost or value of the thing purchased, isn't that true?

A. No, sir, they were not supposed to do it.

Q. They were not supposed to do it, and they didn't do it, as a matter of custom or practice, did they?

(Testimony of Edwin F. Meyer.)

A. No, I only know of one or two instances where the attention was called to it.

Q. Something so flagrant they often protested, is that right? A. Yes, sir.

Q. Mr. Meyer, a great number of requisitions have been brought in [1079—1027] here, some of which you have testified that you did or did not personally prepare? A. Yes, sir.

Q. I will call your attention to this bunch I hold in my hand.

The COURT.—Are they identified?

Mr. ALLEN.—They are all in evidence, your Honor.

The COURT.—Well, call his attention to the exhibit.

Mr. ALLEN.—Well, if he will just mention each one and ascertain and declare whether or not in that particular instance you personally prepared that particular requisition. Call the number of it and tell me whether you did or not.

A. This is exhibit number 75.

Q. What is the fact?

A. 58 N. S. F., September 4, 1907.

Mr. MORRIS.—Is “75” the exhibit number?

A. Yes, sir.

Mr. ALLEN.—Did you personally prepare that?

A. No, sir.

Q. Do you recall the preparation of it?

A. No, sir. I don’t recall the preparation of it. I know it wasn’t prepared in my office either, that is, not in the Storekeeper’s Office.

(Testimony of Edwin F. Meyer.)

Q. That wasn't prepared in the Storekeeper's Office? A. No, sir.

Q. You are not prepared to say whether you furnished the data upon which it was prepared?

A. I know I did not furnish it.

Q. How do you come to remember that so well?

A. Because those people didn't get information from us; they had a requisition office more complete than our office. [1080—1028]

Q. You are prepared to say this is not one of the occasions they phoned you, or came to see you?

A. No, sir.

Q. Are you prepared to say they didn't on this occasion?

A. As a rule, they got more information than we did.

Q. I am not talking about the rule; I am talking about that particular requisition.

A. I am not prepared to say; I would not swear absolutely they did not, but I don't believe they did.

Q. Take the next one and tell me about that.

A. The next is "78," exhibit "78." That is November 15th, 1907, requisition 153.

Q. Did you or did you not personally prepare that one?

A. That requisition was prepared in my office.

Q. Prepared in your office?

A. Yes, sir. I did not personally prepare it; I furnished the information.

Q. You furnished the information, including the estimate, as to the amount and the estimated price?

(Testimony of Edwin F. Meyer.)

A. Yes, sir, I did.

Q. You furnished that information?

A. Yes, sir.

Q. So you are responsible for that, aren't you?

A. Yes, sir.

Q. Take a look at the next one.

A. The next is exhibit "69."

Q. Exhibit "69"? A. Requisition 169.

Q. Did you personally prepare that one?

A. Well, I don't know whether I personally prepared that or not. [1081—1029]

Q. What is your best recollection?

A. My best recollection is probably some one of the clerks in the office under my supervision.

Q. Your best recollection is, then, you didn't personally do it? A. Yes.

Q. That you did not personally do it?

A. Well, my best recollection is I may or may not have; I don't know; I can't tell from the face of the requisition whether I did or not.

Q. I am asking you about your memory with regard to it and the like?

A. I have no memory as to that, at least as to whether it was prepared by some one of the assistants or myself. I know it was prepared in my office.

Q. You have no personal recollection, then, of personally preparing it? A. No, sir.

Q. You have no personal recollection, then, of having somebody else prepare it; is that the idea?

A. No personal recollection, no, but I must have had some one—

(Testimony of Edwin F. Meyer.)

Q. I am asking you about your memory.

Mr. SHIPLEY.—Let him explain his answer.

A. I have no personal recollection, no, sir.

Mr. ALLEN.—Do you have a personal recollection of the fact you did furnish the estimate as to price and number of pounds?

A. Well, I may have.

Q. Well, did or did you not?

A. I have no personal recollection of that fact.

Q. One way or the other?

A. No, sir. I think probably I did, because it was prepared under my supervision.

Q. I think probably you did, yes. [1082—1030]

Mr. ALLEN.—What is the next one?

A. Exhibits "19" and "20," requisition 359 N. S. F., March 6th, 1908.

Q. Did you or did you not personally prepare that requisition?

A. I will examine this and see whether there is any memorandum here. I have no personal recollection of having done it either way.

Mr. SHIPLEY.—Well, look at the record, Mr. Meyer, before you answer that.

A. (Examining papers.) There is nothing in here to show. It may or may not have been prepared by me personally; I don't know, sir.

Mr. ALLEN.—You have no recollection in regard to the preparation of that particular requisition?

A. No, sir.

Q. Have you any recollection of telling a clerk in your office to prepare it? A. No, sir.

(Testimony of Edwin F. Meyer.)

Q. Have you any recollection of furnishing the information upon which it was prepared?

A. No, sir.

Q. Your mind at this time is a perfect blank as to these folders?

A. No, sir, absolutely not. I know the requisition was prepared in the Storekeeper's Office, but as to the details, whether or not I told somebody, or whether or not I did it myself, or whether or not I gave them a memorandum to do it, is a matter—

Q. Have you any personal recollection at this time of furnishing the data or information upon which this requisition was prepared?

A. That is five years ago and it is a physical impossibility.

Q. You are then willing to say you haven't any present recollection?

A. I haven't any with regard to that. [1083—1031]

Q. I will ask you in regard to the next requisition.

A. Requisition, exhibits "17" and "18." The same is true of that. That was prepared in the Storekeeper's Office.

Mr. SHIPLEY.—What requisition?

A. 193, dated December 4th, 1907.

Mr. ALLEN.—Did you personally prepare that requisition, being 193?

A. That I cannot tell.

Q. Did you personally give to any clerk in your office data or information upon which it is prepared, or was prepared?

(Testimony of Edwin F. Meyer.)

A. That I can't say; no information here showing that.

Q. Have you any personal recollection in regard to the preparation of that requisition?

A. I have no personal recollection.

Q. You haven't any personal recollection now with reference, then, to the facts in regard to it, is that right? A. No, sir.

Q. You don't remember it at all, except there is a folder for this particular matter?

A. That is it exactly.

Q. Take the next one.

A. The next is requisition—this is the same requisition 169.

Mr. SHIPLEY.—193 this was.

A. This is 169, exhibit number "15."

Mr. ALLEN.—Did you personally prepare that original requisition?

A. The same is true of that; I can't say.

Q. Answer my question.

Mr. SHIPLEY.—Kindly give us the requisition number.

A. I don't know.

Mr. ALLEN.—Do you recall now whether you had somebody else prepare that requisition? We are talking about this particular [1084—1032] one.

A. No, sir, I do not recall whether I had somebody else prepare that requisition.

Q. Do you recall whether you furnished the information from which that requisition was prepared? A. I do not know.

(Testimony of Edwin F. Meyer.)

Q. You have no personal knowledge of it at this time?

A. No personal knowledge. These requisitions were prepared in the Storekeeper's Office. I probably did.

Mr. MORRIS.—Will you give us the number of that?

Mr. ALLEN.—169.

Mr. MORRIS.—We had 169 awhile ago.

Mr. ALLEN.—What is the next one?

A. The next one is exhibit number "71," requisition 304, February 5th, 1908.

Q. Did you personally prepare that requisition?

A. No, sir, I did not.

Q. Did you personally request anyone to prepare that requisition? A. The records show that I did.

Q. The records show? A. Yes, sir.

Q. Have you any memory in regard to it at this time? A. I have no memory.

Q. You don't recall to what clerk you went with regard to it?

A. No, sir. This shows here, the information here.

Mr. MORRIS.—Speak up louder.

A. This little memorandum here shows the information that I gave the clerk.

Mr. ALLEN.—That happens to be one of the memorandum that was left in the folder? [1085—1033]

A. Left in the folder, yes, sir.

Q. In other words, you prepared it, then; that is your handwriting? A. That is my handwriting.

(Testimony of Edwin F. Meyer.)

Q. You prepared the data and information upon which it was based?

A. I say, I prepared all of those latter ones; that is, when I say I prepared them, they were prepared in the office.

Q. You furnished the information?

A. And I furnished the information. That is, I have no personal recollection of whether I did the physical work, or whether the physical work was done by some one else, but that has an indication that the physical work was done by another clerk.

Q. Now, we will get down to recent history. I call your attention to 438.

Mr. SHIPLEY.—Is that the requisition number?

The COURT.—What is the exhibit number?

Mr. ALLEN.—The exhibit number, your Honor, is “7,” Plaintiff’s Exhibit “7.”

A. Let’s see; there are two of them here.

Mr. ALLEN.—I want 438.

A. Yes, they are both 438.

Q. Referring to the original copy of the requisition pasted on the folder, did you or did you not prepare that particular requisition personally?

A. I couldn’t say whether I did or not, sir.

Q. You couldn’t say whether you did or not?

A. No, sir, I couldn’t say whether I did or not.

Q. Did you or did you not request some one else to prepare 438?

A. I couldn’t say absolutely whether I did. It has been a long while. [1086—1034]

(Testimony of Edwin F. Meyer.)

Q. So your memory about 438 is rather hazy; is that true?

A. Not any more hazy about 438 than any other requisition along about that time.

Q. Can you now recall any requisition for \$4,000 worth of material of this kind for stock in your warehouse?

A. A large number of requisitions were prepared at that time running into the thousands.

Q. You name for the satisfaction of this jury any one requisition for \$6,250 in the month of April, 1908, for stock in your warehouse?

A. Well, we have an exhibit here—I haven't investigated the files of the navy yard for that purpose, but I think from—say, from March until June you could find a large number of requisitions over \$500, running into thousands of dollars maybe, but I find that there is one here, in looking over these folders, where the amount was about \$3,000.

Q. Read him the question; he probably doesn't recall it. Read him the question. (Question repeated.)

A. I have no facts here from which I could gather that; I don't recall.

Q. You don't recall any, as a matter of fact, Mr. Meyer?

A. I didn't recall this zinc transaction until it was brought up here.

Q. You don't recall the zinc transaction?

A. I say I did not.

Q. Don't you think it is remarkable, Mr. Meyer,

(Testimony of Edwin F. Meyer.)

with the splendid memory that you have, that you don't recall anything with regard to the largest zinc transaction that passed through your office during this hurry period for the purchase of supplies in your office? [1087—1035]

A. Well, I don't know it is the largest zinc transaction we were doing.

Q. For the purchase of stock?

A. We were doing lots of business there.

Mr. ALLEN.—Well, with your good memory, Mr. Meyer, is it or is it not a remarkable fact you can't now recall anything with regard to the origination of the largest requisition for stock prepared in your office during those months?

A. Well, there are hundreds of requisitions. I don't know this is the largest. You say it is the largest.

Q. Well, can you tell me anyone that is as large for stock in those two or three months?

A. No, that has been five years ago. I have been separated from these files for five years; it is a physical impossibility.

Q. Yes.

A. I haven't seen the files for five years, sir.

Q. Well, where is 438 again?

Mr. MORRIS.—Isn't there a photographic copy of 438 here that shows the initial of—

Mr. ALLEN.—Just a moment, now, you can cross-examine.

Mr. ALLEN.—Your Honor, Mr. Vanderveer wanted to recall Mr. Kettlewell and ask him one ques-

(Testimony of J. A. Kettlewell.)

tion. I believe it was with the idea of letting Mr. Kettlewell go, perhaps.

The COURT.—Very well, I have no objection.
[1088—1036]

**[Testimony of J. A. Kettlewell, for Defendants
(Recalled).]**

J. A. KETTLEWELL, recalled as a witness on behalf of the defendants, further testified as follows:

Direct Examination.

(By Mr. VANDERVEER.)

Q. Mr. Kettlewell, I believe you were examined regarding the practice of your office in sending out proposals and sending them and making awards?

A. Yes, sir.

Q. If I correctly understand the situation, all proposals are made with the right reserved on the part of the Government to reject all bids? A. Yes, sir.

Q. And in each of these folders, on the last page, there is a white sheet which is known as the notice of the award? A. Yes, sir, that is a copy.

Q. That is a copy of the notice which is mailed to the successful bidders? A. Yes, sir.

Q. Who prepares and mails this notice of award?

A. One of the clerks in the office.

Q. At what time is that done?

A. Well, it is done after the bids are opened, of course, and mailed out that evening.

Q. Goes out that evening. Now, until that is mailed out the Government has the right to reject all bids, the matter is open in the Government's hands; is that not true?

(Testimony of J. A. Kettlewell.)

A. Yes, the award might be withheld for some reason or other.

Q. It is a fact, Mr. Kettlewell, is it not, that until that notice is mailed the whole case is in the Government's hands to do as the [1089—1037] Government likes? A. Yes, sir.

(By Mr. ALLEN.)

Q. Mr. Kettlewell, while this power remains in the Government officials to accept or reject any bid, it is a matter of fact, if an officer had a particular personal private interest in seeing that the bid was accepted or rejected, why, that would have some effect upon his conclusion with reference to that particular bid, would it not? A. Yes, sir.

Mr. ALLEN.—That is all. [1090—1038]

[Testimony of E. S. Fowler, for Plaintiff.]

E. S. FOWLER, a witness on behalf of the defendants, recalled on behalf of the plaintiff, further testified as follows:

Direct Examination.

(By Mr. ALLEN.)

Q. Mr. Fowler, you have been sworn, I believe?

A. Yes.

Q. Mr. Fowler, you were called as a witness for the defense the other day and testified in regard to your experience with Mr. Bryan when he called on you in the month of May, 1910, as I remember it. You recall that matter, do you? A. Yes, sir.

Q. At that time in your examination you made use of the following statement: I want to call your attention particularly to it. In answer to a question pro-

(Testimony of E. S. Fowler.)

pounded to you by either myself or Mr. Schlesinger you answered as follows: "And when he came in" referring to Mr. Bryan—"he pulled a card out of his pocket and stated—asked me if I had ever been connected with the Great Western Smelting & Refining Company or the Fowler Metal Company." You said, "Now people come in constantly in my office and pull out cards, and I did not notice that it was a Government officer. I did not pay any attention to it. And I denied the fact that I had—that the Fowler Metal Company had ever been connected with the Great Western Smelting & Refining Company during the time I was manager of that concern." Now, calling your attention to this—

Mr. SCHLESINGER.—You read that so fast, the last three lines, I didn't get it at all.

The COURT.—Read it again, please.

Mr. ALLEN.—I will read that part of it again, Mr. Schlesinger. [1091—1039] "and when he came in"—referring to Mr. Bryan—"he pulled a card out of his pocket and stated—asked me if I had ever been connected with the Great Western Smelting & Refining Company or the Fowler Metal Company. Now, people came in constantly into my office and pulled out cards, and I did not notice it was a Government officer. I did not pay any attention to it. And I denied the fact that I had—that the Fowler Metal Company had ever been connected with the Great Western Smelting & Refining Company during the time I was manager of the concern. It was never known generally that the Fowler Metal Com-

(Testimony of E. S. Fowler.)

pany was identified with the Great Western Smelting & Refining Company, and I denied it. Then afterwards when I came to Seattle and discovered that I was up before the Government, etc., that other matter.

Mr. ALLEN.—I want to ask you whether, on the occasion of the first visit of Mr. Bryan to your office, whether or not he presented and called your attention to, this card (exhibiting card to witness).

A. When I came to Seattle—

Q. Answer the question, please, Mr. Fowler.

A. Yes.

Mr. ALLEN.—He did call your attention particularly to this card?

A. Yes, sir.

Q. And that is apparent on its face he is a representative of the United States Government.

The COURT.—Is that to be offered in evidence? If it is, identify it so you will not lose it.

Mr. ALLEN.—We offer it in evidence, your Honor, with permission to put in a copy.

The COURT.—Identify it so you will not lose the connection. [1092—1040]

Mr. SCHLESINGER.—The witness was about to vouchsafe an explanation when interrupted by counsel. Now, you may explain your answer.

A. I didn't realize at the time, this time it was presented by Mr. Bryan, didn't look at it close enough to know, but when I came to Seattle and realized I was to appear before the Government, I knew it was time for me to tell the truth, and I found

(Testimony of E. S. Fowler.)

Mr. Hutson, I think is the name of the attorney for the Government, and Mr. Bryan, and immediately explained to them the whole proposition. Then Mr. Bryan showed me this card that he stated that he showed me in the first place, and I have *how* word for that, that that is the card that he showed me.

Mr. ALLEN.—Haven't you just testified that was his card he showed you in the first place?

A. I believe it was from the fact of Mr. Bryan showing me the card in Seattle, or rather, in Tacoma.

Mr. ALLEN.—So you understood in the first place he was in some way a Government representative?

A. No, not in the first instance.

Q. Did you or did you not read the card on the—

A. No, not in the first instance.

Q. You looked at it, did you?

A. No, I didn't take it out of his hand and look at it. He just handed me his card and said, "This is my card."

Q. Do men who come into your office usually have cards of that character, with the man's photograph on the face of it?

Mr. SCHLESINGER.—I object as argumentative and not proper cross-examination.

The COURT.—He may answer. Exception.

Mr. ALLEN.—Answer the question.

A. I didn't understand the question. [1093—1041]

(Question repeated.)

A. Well, I didn't really notice the photograph at

(Testimony of E. S. Fowler.)

that time. I didn't notice anything about the card.

Mr. SCHLESINGER.—Did you have the card in your hand?

A. No.

Mr. ALLEN.—We offer that in evidence, with permission of counsel, to certify a copy.

Mr. SCHLESINGER.—I think if we are going to have Mr. Bryan's photograph you ought to give everyone in the courtroom a copy.

Mr. ALLEN.—Any objection?

Mr. SCHLESINGER.—Oh, I don't care whether it goes in or not.

The COURT.—Admitted.

(Card referred to received in evidence and marked Plaintiff's Exhibit "85.")

Mr. ALLEN.—Mr. Fowler, as I understood in your direct examination, you stated that a Mr. Alper suggested to you that he wanted to use the name of the Fowler Metal Company for the purpose of putting in a bid; is that right?

Mr. SCHLESINGER.—Your Honor please, we object to that as not being proper cross-examination and the subject having already been exhausted. You asked me to keep him here to put him on for this one purpose, and I have done so.

The COURT.—Oh, he may answer.

Mr. SCHLESINGER.—Exception.

Mr. ALLEN.—Mr. Fowler, then the next time you heard of this matter was when Mr. Bryan called on you in Oakland; is that right?

A. Yes, sir.

(Testimony of E. S. Fowler.)

Q. The next time it was called to your attention. You didn't receive any other information in regard to it until that time, did you? [1094—1042]

A. No, sir.

Mr. ALLEN.—That is all.

On cross-examination by Mr. SCHLESINGER said witness testified as follows:

Q. Mr. Fowler, did Mr. Bryan put that card in your hands for examination? A. No, sir.

Q. Did he simply take it from his pocket and say, "Here is my card"?

A. He just pulled this out of his pocket and showed it to me, but I didn't look at it, didn't realize what it was.

Q. You appeared before the Federal Grand Jury as a witness for the Government in the year 1911, did you not? A. Yes, sir.

Q. In the city of Seattle? A. Tacoma.

Mr. SCHLESINGER.—Just one more question.

Q. Did you tell the Grand Jury the precise facts as you told them here?

Mr. ALLEN.—I object to that, your Honor.

The COURT.—Sustained. He testified to that.

Mr. SCHLESINGER.—Exception. That is all.
[1095—1043]

[Testimony of Edwin F. Meyer (Recalled—
Cross-examination).]

EDWIN F. MEYER on the stand.

Cross-examination (Resumed).

(By Mr. ALLEN.)

Q. Calling your attention, Mr. Meyer, to Plain-

(Testimony of Edwin F. Meyer.)

tiff's Exhibit Number "77," I will ask you whether or not you personally prepared that requisition.

A. May I have the Storekeeper's folder, please?

Q. What is the number? A. 154.

Q. In the meantime, while we are finding that folder, I will ask you as regards Plaintiff's Exhibit Number "79," 444, as to whether or not you personally prepared that (handing same to witness).

A. I would like in each case, please, to have the Storekeeper's folder.

Q. Well, I thought he was handing me that. That is the one on this side of the Sound, isn't it?

A. Yes.

Q. Mr. House insists this is the right copy of 154. Is it or is it not?

A. This is the Storekeeper's copy of 154; this isn't the copy you had just now.

Q. Did you personally prepare that requisition?

Mr. MORRIS.—Mr. Allen, if you will stand back from the witness then he would answer so the jury would hear and we would hear. He drops his voice.

A. Judging from the instrument it is—

Mr. ALLEN.—I am asking you as to your personal recollection in the matter. [1096—1044]

A. No, sir, from personal recollection, no, but from this memorandum in here I would say that I did not do the physical work.

Q. You would say that you did not?

A. Yes, sir, but that memorandum is the only information that I have.

(Testimony of Edwin F. Meyer.)

Q. You have no personal recollection in regard to the matter?

A. No personal recollection; no sir.

Mr. SHIPLEY.—Is that 154?

Mr. ALLEN.—That is 154.

Q. You have no personal recollection, then, of requesting the clerk there to help you prepare the requisition?

A. No personal recollection, except from the record inside the folder.

Q. Mr. Meyer, in the preparation of a *requisition* were concerned about several different things. You were concerned, as I understand it, with reference to the time when you would need the material; isn't that true?

A. Yes, sir, the probable time.

Q. The probable time when you would need the material? A. Yes, sir.

Q. You were concerned as well with regard to the amount of the material which you might require; is that true? A. The quantity.

Q. The quantity of the material which you might require? A. Yes, sir.

Q. You were concerned as well as to the price which you must estimate or fix upon that material; isn't that true? A. Yes, sir.

Q. You had, then, for the purpose of covering these different—where would you get your information with regard to the quantity which you required? [1097—1045]

A. It depends very largely upon the conditions

(Testimony of Edwin F. Meyer.)

existing at that particular time.

Q. Read him the question, please. (Question repeated.)

A. The same answer, Mr. Allen. In probably all—

Q. With reference, calling your attention to an article such as zinc of the size 12 by 6 by $\frac{1}{2}$ inch. Where would you get your information with regard to the quantity which you would require?

A. Well, I would get that from the demands of the ships; I would get it from the storeman—later on from the storeman.

Q. In getting it from the storeman, then, you would refer to this card, referring to zinc plates of that size, you would refer to this card which was in the warehouse of the storeman; is that right?

A. Ordinarily, yes, sir.

Q. Ordinarily? A. Yes, sir.

Q. On the first day of April, 1908, or prior thereto, did you proceed to the warehouse and examine this particular account "E"? A. No, sir.

Q. Do you remember whether you did or not?

A. I don't remember.

Q. Are you sure that you did not do so?

A. I won't say that I did not do so.

Q. Will you say that you did so? A. No, sir.

Q. You don't remember whether you did or not?

A. No, sir, not from personal memory now whether I did or not.

Q. You have no personal recollection?

A. No, sir.

(Testimony of Edwin F. Meyer.)

Q. You could, by personal inquiry from Mr. Lockwood, by phone or [1098—1046] personal call, have ascertained that on April 1st, 1908, you had in your warehouse 52,404 pounds of zinc of the size 6 by 12 by $\frac{1}{2}$ inch, couldn't you?

A. I could have ascertained that.

Q. You could have ascertained that, and yet you are not now prepared to tell the jury whether, as a matter of fact, you did go and make that inquiry; is that right? A. My best judgment is that I did not.

Q. That you did not? A. Yes, sir.

Q. Then, Mr. Meyer, in fixing the estimated cost, you testified the other day that this estimate placed by you was an absolute restriction upon the purchasing officer that he was not supposed to exceed by ten per cent the amount of the estimate supplied by you; is that right?

A. When I say absolute, I don't think I said absolute, because I don't so consider it.

Q. I said he was not supposed to; is that right?

A. That is better, yes, sir.

Q. That is a restriction upon the Purchasing Officer at Seattle? A. So regarded at that time.

Q. So regarded, and supposed to be followed, as a matter of fact, by policy?

A. Yes, sir, that he should not exceed that.

Q. Then as that was the governing check upon other officers and employees of the United States Navy with reference to the purchase of supplies, the amount of that, the highness or lowness of the estimate, becomes a serious matter as regards the costs

(Testimony of Edwin F. Meyer.)

of that article, doesn't it?

A. No, sir, it doesn't become a serious matter.
[1099—1047]

Q. In other words, it was a check as regards the gross amount which might be paid for an article, it was a check upon the other officers; isn't that true?

A. As regards exceeding that, yes, sir.

Q. Yes, sir. A. Yes.

Q. Then, if there was a wrong conspiracy or an agreement, on the part of someone else other than yourself, Mr. Meyer, to wrong the Government by obtaining a high price, if you placed a high or unusual estimate upon the cost of that particular article, that would then necessarily serve the purpose of the men on the other side of the Sound, would it not?

A. That is a conclusion I imagine would follow.

Q. That is a conclusion that would follow?

Mr. ALLEN.—To what source did you go in your attempt to fix the estimate of 12½ cents prepared on requisition 438?

A. I cannot at this time say. It must have been fixed in my mind. There are a large number of requisitions going through at that time for zinc. The fixed or standard local price seemed to have been about 12½ cents, as shown by the approval of those requisitions and awards by the navy yard at Washington, D. C.

Q. You might have gone, Mr. Meyer, to your own books from supply houses for the estimated prices, mightn't you? A. I could have.

Q. You could have? A. Yes, sir.

(Testimony of Edwin F. Meyer.)

Q. You might have gone to your own ledger and ascertained from there the cost of that same article in prior purchases; is that true? A. I could have.

Q. You could have? [1100—1048]

A. Yes, sir.

Q. Calling your attention to Plaintiff's Exhibit "1"—calling your attention to Plaintiff's Exhibit Number "2," I will ask you whether or not that has been identified, as I understand, and is a part of the ledger kept in your office within 10 or 12 feet from where you sat. Tell the jury as to whether or not you referred to this ledger at that time in your attempt to get the estimated cost or price to be fixed upon a carload of zinc for the navy yard.

A. I don't think I said that I attempted to get the estimated price. I would testify, however, that, to the best of my recollection, I did not refer to this.

Q. You did not refer to that? A. No, sir.

Q. So then you didn't observe that the United States Government had had delivered to it within a month a car of zinc which cost them .713 cents per pound, did you?

A. I don't think I referred to it at the time.

Q. You haven't any recollection that you did?

A. No, sir.

Q. If you did see it that time you disregarded it, isn't that true?

A. Well, I did not disregard it. It was the idea to purchase that through the local pay office.

Q. If you did see that you disregarded that estimate, didn't you?

(Testimony of Edwin F. Meyer.)

A. Yes, if I did I disregarded the estimate, yes, sir. I might also say here in answer to that, that there was in the same book, probably the very next page, a sheet which showed estimates ranging from ten to sixteen cents. I might have referred to the book and might have seen that page.

Q. In carload purchases? [1101—1049]

A. I wouldn't look for carloads particularly.

Q. Those were the last four purchases in your ledger that I have just shown you?

A. Those are the bookkeeper ledgers.

Q. Yes, and you would naturally refer to the last purchases rather than five years ago?

A. Five years ago?

Q. Wouldn't you naturally refer to the last purchases?

A. Truly, I don't think any of those referred to five years ago.

Q. You would naturally refer to the last ones rather than six months or a year ago?

A. Those were in there at that time.

Q. Did you see either one of them?

A. I don't recall that I did.

Q. Did you at that time, when you were making your estimate of 12½ cents, did you have any memory of the fact that there had crossed your desk this invoice of a car of zinc at \$7.13 a hundred?

A. I have no memory of that. There were thousands of papers crossing my desk.

Q. Did you have any memory about it, then, Mr. Meyer, on April 1st, 1908?

(Testimony of Edwin F. Meyer.)

A. Evidently I did not; I can't say now I did.

Q. If you had remembered that that would probably have caused you to lower this estimate in price?

A. I think it would have.

Q. You didn't go back through the records, then, to find out what other purchases of cars of zinc had been made to the United States Government there?

A. There were so many and numerous requisitions at that time I think [1102—1050] the price was probably fixed in my mind at that time.

Q. Do you remember any other purchases of cars of zinc other than this that was delivered to the Government there within two weeks?

A. Not cars, no, sir.

Q. Not cars, no, sir, not like that. Well, when this requisition came up to you, or as you prepared it, then you want to say it was done?

A. It isn't a question of wanting to say, Mr. Allen.

Q. Well, whichever way you say—pardon me, then. Whichever way this was done, Mr. Meyer, I show you Plaintiff's Exhibit Number "6" and Plaintiff's Exhibit Number "5," referring to the original requisition which went, as I recall, to the Auditor's Office. Referring at the same time to requisition number 6, that part of the requisition which went to the Board of Supplies and Accounts, or Department of Supplies and Accounts, I will ask you whether or not, as this requisition was prepared, whether this part which went to the Auditor's Office was placed on top of that requisition which went to

(Testimony of Edwin F. Meyer.)

the Department of Bureau of Supplies and Accounts?

A. I didn't hear that, will you read that question, please.

Q. (Question repeated.)

A. I think so. This is the first copy and—

Q. You say this is the first copy?

A. This first copy that is now with the Auditor, yes, sir, that was forwarded with a number of other copies.

Q. Where was it placed with reference to this copy which went to the Bureau of Supplies and Accounts?

A. It was the first copy placed necessarily, the first paper.

Q. Then one of the other papers below would go to the Bureau of Supplies and Accounts? [1103—1051] A. Yes, sir.

Q. In other words, as these came up, then, the six copies, the one that went to the Auditor's Office with no price extended thereon, appeared on top; is that right? A. Yes, sir, that is correct.

Q. As that now appears, Mr. Meyer, it says "50,000 pounds of zinc, *pounds of zinc* rolled sheet boiler plate $\frac{1}{2}$ by 6 by 12," with no estimate thereon as to the proposed cost of that zinc. That is the usual and ordinary form, isn't it?

A. That is the regulation, yes, sir.

Q. There is no extension thereon of the proposed cost to the United States Government. Is that the usual and customary form?

A. That is the regulations.

(Testimony of Edwin F. Meyer.)

Q. Then as soon as those were laid on your desk, these without the price thereon were on top and the other copies were below, is that right?

A. Yes, sir.

Q. When they went from your desk to the desk of Paymaster Spear would they go in that same form and manner? A. Identically.

Q. In other words, when they reached Paymaster Spear's desk this copy was on top which has not the price extended thereon, is that right?

A. Yes, sir.

Q. You have heard Paymaster Spear's testimony as regards his method of handling these requisitions as they came up to him, that he would turn back the original requisition which has not the price thereon and take a look at the price on the second sheet. Does Mr. Spear's testimony in that regard conform or confirm your own personal recollection? [1104—1052] A. I think that is so; yes, sir.

Q. That is substantially true? A. Yes, sir.

Q. Then, when these requisitions, that is, the original and five copies, reached the desk of Mr. Spear, with the original copy without any price extended, if you rolled back the original sheet and looked at this second, or any copy thereafter, which says \$625, unless Mr. Spear stopped to read the entire requisition he would think that the estimate was for the purpose of \$625, would he not?

A. Yes, sir, naturally.

Q. Naturally. A. Yes, sir.

Mr. ALLEN.—Mr. Spear had, then, with this sec-

(Testimony of Edwin F. Meyer.)

ond sheet before him, he would have had, then, the possibility, if he noticed this disparity at all, he had, then, the possibility of solving in his mind as to whether it was intended for 5,000 pounds and a real total of \$625, or whether it was intended for a purchase of 50,000 pounds and a total of \$6,250, he could figure or guess either way, couldn't he?

Mr. ALLEN.—You were never interested in the fact of the probable consummation of this deal, but endorsed in your own handwriting thereon a request to fill requisitions from the Atlantic Battleship Squadron—request the waiving of advertisements and purchase through the Navy Pay Office, Seattle, Washington; you made that personal request, did you not, at that time?

A. I wouldn't consider it a personal request. It was done in the performance of my duty as I saw it at that time.

Q. You wrote that on there at that time?

A. I did, and I so wrote that on every requisition that left the [1105—1053] Storekeeper's Office over \$500 at that period.

Q. You knew at that time that you were proposing to buy a full car, 50,000 pounds, of zinc at an estimated price of 12½ cents a pound, didn't you?

A. Why, I thought there must be about two cars.

Q. You thought it might be about two cars?

A. Yes, I thought it might be about two cars.

Q. Although you just had a bill of lading for exactly the same amount to go through your hands within two weeks, you thought this would be two cars?

(Testimony of Edwin F. Meyer.)

A. Bills of lading and other papers are routine; I wouldn't pay very much attention to those things unless I went looking the information up.

Q. A little purchase like a car of zinc, then, when you are ordering one within two weeks, did not attract your attention?

A. There were probably a thousand of those things at that particular time; not a thousand cars, but a thousand things. I was concerned principally in the items, not so much—

Q. How many cars of zinc did you purchase in the year 1908 through the Navy Pay Office, through that Navy Pay Office here in Seattle?

A. I can't say; not many.

Q. Don't you know, as a matter of fact, you didn't purchase any more?

A. Well, we bought 22,000 pounds at one time.

Q. Answer my question.

Mr. SHIPLEY.—We submit he is answering.

Mr. ALLEN.—Don't you know you didn't purchase another full car of zinc in the year 1908 through the Seattle Office?

A. Well, 22,000 pounds might be a car. We purchased that in 1908. [1106—1054]

Q. You never purchased one at 50,000 pounds or one approximately at that amount?

A. No, sir, I shouldn't say that, either. I shouldn't say that I purchased, because I don't purchase, but I presume I submit a requisition for it. That is a mere technicality, but I would like to straighten it out.

(Testimony of Edwin F. Meyer.)

Q. I understand. You fixed, then, Mr. Meyer, the period of time of fifteen days, I believe, on this requisition as it left your office; is that right?

A. Yes, sir.

Q. You had, then, information in your hands at that time that a car of zinc had been awarded and a delivery made in about three to four weeks. Why didn't you fix the same liberal allowance of time on this requisition that it required in the case of the purchase by the Government of the other sum or similar amount?

Mr. MORRIS.—We object to the question. It is not founded upon any evidence in this case. The evidence is not three or four weeks, Mr. Allen, it is three or four months. It was purchased in December, 1907, and delivered in March, 1908.

The WITNESS.—Requisition was made in the Storekeeper's Office, Puget Sound, Washington, December 8th, 1907.

Mr. ALLEN.—I will not ask that; I withdraw it.

Q. Do you recall the fact the award was made in this former car of or purchase of zinc on the 4th day of February, 1908, and that zinc arrived in your yard about five weeks thereafter.

A. If the records show it that is true, yes, sir. I have no personal recollection.

Q. Arrived thereafter on the 7th day of March?

A. I have no personal—

Q. You could have ascertained that fact by referring to this ledger, [1107—1055] or referring to the bill of lading which had gone through your

(Testimony of Edwin F. Meyer.)

hands? A. Yes, sir, I could have.

Q. Then, if you had fixed the proper amount of time required under your former experience or within a month, then the Seattle Hardware Company or any other concern in the city of Seattle of like standing, could have purchased that zinc in the open market and supply the navy yard?

A. You understand that award was made in Washington, and my requisition called in the first place for delivery within—in two installments. The Bureau at Washington altered that.

Q. You are talking about the original one?

A. I am talking about the first one.

Q. I am talking about the second one.

A. You are shifting so much.

Q. If the record discloses, as you know it does disclose, Mr. Meyer, that in the original purchase, the original car of zinc, the award was made on February 4th, and the zinc arrived in your yard on March 7th thereafter, why didn't you give this contractor who was going to supply the second car of zinc the period of time which was shown from your own records would be necessary.

A. I didn't give the contractor anything in the case of the second. I merely stated in the requisition it was wanted fifteen days after date of award. That wasn't binding upon the Purchasing Pay Officer. That is elastic; he could have made it twenty-five or thirty days. In fact, in most instances he paid very little attention to that requirement there.

Q. In this particular case, Mr. Meyer, he reduced

(Testimony of Edwin F. Meyer.)

the time to five days. If there wasn't a car of zinc on the Seattle market wouldn't the United States Government, with the five-day delivery, [1108—1056] been absolutely helpless in the face of that sort of an award?

A. The requisition stated fifteen.

A. I can't say as to that, as to the helplessness of the United States Government, sir.

Q. Beg pardon?

A. I can't say as to the helplessness of it.

Q. You do know, Mr. Meyer, the shrewd man that you are, that the time of delivery, where you are purchasing material that isn't on this market, where it must be had from a distance, that the time of delivery of that material is a vital element in the cost and the number of bidders who might participate or bid on that award?

A. I could have made the delivery on the requisition five days in the first place, instead of fifteen, had I looked at it in the way you wish me to, or think I am, or did.

Q. You could have made it that?

A. I think so, yes, sir, but I made it fifteen because—

Q. If the battleship fleet, as you knew, Mr. Meyer, at that time was coming, the first ship, about the 22d day of May, 1908, the other boats to come thereafter, if you knew that fact at that time, why didn't you give the Government the benefit of the doubt and provide for a delivery of, say, thirty days, which would be the 15th day of May, 1908?

(Testimony of Edwin F. Meyer.)

A. Why, do you understand how much time it takes for the correspondence to go back and forth and for bids to be received on these things? Sometimes it takes as many as thirty days on these things.

Q. But award was made on the 15th.

A. I had nothing to do with the award in that case, sir. The requisition was initiated before the award was made, and [1109—1057] this was a statement that was put on the requisition.

Q. And you knew as soon as that traveled to the city of Washington that telegraphic authority would come to the Navy Yard Office in the city of Seattle to purchase that zinc under the conditions you had inserted upon this requisition, didn't you?

A. Well, then it was up to the Purchasing Pay Officer to get bids. Sometimes it takes two weeks for him to get bids.

Q. But you knew, as a matter of fact, that the telegraphic word would come from Washington for this Navy Pay Office to proceed and buy that article, didn't you?

A. Not always, sometimes they did.

Q. Tell this jury what requisitions from the Atlantic Battleship Squadron were on file in your office on April 1st, 1908?

A. I don't know that any were there. We began to receive requisitions on or about that time.

Q. You saw the letter here, you have read the letter of Paymaster Spear of April 21st or 22d, 1908, in which he asks them for requisitions, and yet you don't prepare to—

(Testimony of Edwin F. Meyer.)

A. Well, we then had requisitions in the Store-keeper's Office. I saw them no doubt around April 1st from battleships. They were forwarded up from Magdalena Bay and Santa Cruz, and around there.

Q. Did you have any requisitions from any Atlantic Battleship, or any battleship on the Atlantic Coast on or before April 1st, 1908, in your office?

A. On or about April 1st we had requisitions.

Q. On or about? A. Yes, sir.

Q. This requisition left your office on April 1st?

A. Yes, sir.

Q. Did you have any prior to that date? [1110—1058]

A. I can't say as to that, but it wouldn't have been necessary. That requisition was not based on requisitions from battleships. The material was required for it to fill requisitions, that is, requisitions to be received. This was in anticipation of the requisitions.

Q. This was in anticipation?

Mr. SCHLESINGER.—I must object. Counsel must not inject his own personal remarks or opinions while this man is testifying. It is the worst kind of official misconduct.

The COURT.—Proceed.

Mr. SCHLESINGER.—Allow us an exception.

Mr. ALLEN.—This card from Lockwood's storehouse, you have heard the testimony that approximately 15,000 pounds was all that was ever delivered to the ships of the Atlantic Battleship Squadron?

(Testimony of Edwin F. Meyer.)

A. Correct, sir.

Q. If there were any requisitions on file in your office they wouldn't at least have exceeded that sum, would they? A. I didn't ask for this—

Q. Pardon me. Read him the question.

A. This is the fact: This was in anticipation and not for the purchase of anything upon requisitions which had been received. We were required to anticipate these requisitions, their requirements. If I had waited until these requisitions came in from the ships the ships never would have gotten the supplies.

Q. Well, Mr. Meyer, your purchases of zinc plate has heretofore always been in small amounts?

A. Very small; yes, sir.

Q. Very small amounts, and the navy authorities at Washington had supplied you with 50,000 pounds and you just received it? [1111—1059]

A. Yes, sir.

Q. And when the actual requirements of the Atlantic Battleship Squadron didn't exceed 15,000 pounds you went rather strong when you asked for 50,000 didn't you?

A. The actual requirement—one requisition there shows a requirement of 1500 plates, and that would amount to 15,000 in itself, one ship.

Q. You are reading now for this jury into that requisition which you started to read wrongly to them this morning?

A. I did not start to read wrongly.

Q. You read the letter "S" as reading "sheet"?

(Testimony of Edwin F. Meyer.)

A. No, sir.

Mr. MORRIS.—May it please your Honor, again I appeal to this Court for protection, and we have tried to keep within the bounds of decent practitioners. If the Court doesn't furnish us the protection we appeal for we have got to take it on our own hands and take the consequences. Now, we again respectfully request the Court to instruct the District Attorney not to make these insulting remarks and insinuating remarks that are not justified in any court of justice.

The COURT.—Why, Mr. Morris, I just suggested those interpolations be eliminated and proceed with the trial, and I simply made the observation that has been going on during this trial, and there is no occasion to refer to it again. Proceed.

Mr. MORRIS.—Exception.

Mr. ALLEN.—Mr. Meyer, if Mr. Lockwood, the custodian in charge of the metal storehouse at the navy yard says that there was 1500 pounds of zinc delivered to that ship, the "Kearsarge," I believe it was, in regard to which you testified this morning, Mr. Lockwood is more likely to be right about the matter than you are [1112—1060] with your speculation possibly as to what that might mean; isn't that true?

A. I am not speculating as to the delivery of the zinc. I am stating a fact which actually exists on the requisition, that the requisition called for 1500 plates and not pounds.

Q. It calls for 1500— A. Plates, sheets.

(Testimony of Edwin F. Meyer.)

Q. Do you wish to tell the jury at this time that requisition does read sheets, or says the letter "S"?

A. It doesn't use the letter "S"; it says number, meaning the article.

Q. Mr. Meyer, doesn't it, then, use the letter "S" in that way? A. No, sir, it does not.

Q. You, in your endeavor to ascertain the amount of zinc actually on hand, and your promise of using a second car, would be controlled, would *it* not, ordinarily, Mr. Meyer, by the amount of zinc that you had in your warehouse as computed against the probable demands on that store; isn't that true?

A. Yes, sir.

Q. Calling your attention to a matter to which I called your attention this morning, is that the sheet (handing paper to witness)? A. Yes, sir.

Q. What did you read into that except the words "207, number, do 1500 S, zines for boilers 12 by 6 by 1/2 inch, 15 \$225 E." Is there anything else on that requisition you didn't show me this morning? A. Anything else I didn't show you?

Q. Yes.

A. I don't know I showed you very much. That "S" was inserted [1113—1061] there by me. You will find quite a number of them there.

Q. When did you insert that?

A. When it got in my hands. You will find that on most of these requisitions. That "S" is a designation.

Q. Did you insert that at that time or recently?

A. No, indeed. This was inserted—

(Testimony of Edwin F. Meyer.)

A. He is right here talking in my ear. There is that "S" against all those items showing it was inserted at the time the requisition was made in my office.

Mr. ALLEN.—I was trying to ascertain whether there is anything on here that shows that is plates instead of pounds, Mr. Meyer

A. Well, it doesn't say plates, p-l-a-t-e-s, but it says "Number," which is the same thing.

Q. Was there ever a ship, Mr. Meyer, that took 15,000 pounds of plates of this size out?

A. We have a ship smaller than that that took 10,000 pounds.

Q. Was there ever a case of a ship that took 15,000 pounds, Mr. Meyer?

A. I have no recollection of it, Mr. Allen.

Q. And don't you know, as a matter of fact, this ship only took 1500 pounds?

A. I think the ship wanted 1500 plates.

Q. You think. It is based upon your observation?

A. Well, it is shown there by the record, Mr. Allen. That is the only thing I can go by.

Q. What did they get, Mr. Meyer, how much did they get? A. I have no knowledge of that.

Q. The card shows 1500?

A. Well, the card does, but that need not necessarily—

Q. You haven't any personal knowledge beyond that card? [1114—1062]

A. To the contrary, no, sir.

Q. Nothing beyond that card?

(Testimony of Edwin F. Meyer.)

A. No, sir. But I would say if an officer of the ship asked for 1500 plates they came pretty near getting it, because they don't get very much less than they ask for, if the material is on the yard.

Q. Calling your attention to Plaintiff's Exhibit Number "79," which is requisition number 444, did you ever prepare that requisition personally (handing same to witness)?

A. I would like to see the Storekeeper's folder. This is the Pay Office. If there is anything in it showing a memorandum or anything—otherwise, that wouldn't have any information, sir.

Q. Have you any personal recollection about 444?

A. No, sir.

Q. You are not prepared to say at this time that you did or did not personally prepare the original requisition; is that right?

A. Not from personal recollection.

Q. You won't say whether you did or not, or whether you requested some clerk to do it; is that right?

A. No, sir. It has been five years ago and pretty hard to say from memory.

Q. Calling your attention to Plaintiff's Exhibit Number "63" (handing same to witness), I will ask you whether or not you personally ever prepared that requisition.

A. Let me have the Storekeeper's folder.

Q. You look for it, Mr. Meyer; you are more familiar with it than I am.

Mr. SHIPLEY.—Give us the number.

(Testimony of Edwin F. Meyer.)

A. 356. I am not able to say personally whether I did the physical work; that is what you want?
[1115—1063]

Mr. ALLEN.—That is what I am asking about.

A. Yes.

Q. Did you or did you not personally prepare that? A. I don't know.

Q. Do you remember now whether you did or did not personally request anyone in your office to prepare that?

A. I don't know. It may have been either way.

Q. You don't personally recall 356?

A. Yes, sir. By the way, this is 358.

Q. All right. I ask you about the next one. What is the number of that requisition? A. 79.

Q. Did you personally prepare that requisition?

A. No, sir, I did not.

Q. You did not? A. No, sir.

Q. Did you personally request some one to prepare it? A. No, sir.

Mr. MORRIS.—What is the requisition?

A. 79.

Mr. MORRIS.—Is that the exhibit number?

A. Yes, sir.

Mr. ALLEN.—Did you furnish any information upon which it was prepared?

A. No, sir, I have no recollection of it. *I almost* positive I did not.

Q. You were then Principal Clerk, were you not, in that office? A. Yes, sir.

Q. Your duties, then, as requisition clerk, re-

(Testimony of Edwin F. Meyer.)

quired you to prepare those, did it not? [1116—1064]

A. Some requisitions, but this requisition was prepared in the Steam Engineering Department.

Q. As a matter of fact, that came through your office?

A. That was prepared in the Steam Engineering, then forwarded to our office.

Q. Are you prepared to say whether or not you quoted the figure at which that was prepared?

A. No, sir, I did not.

Q. You are absolutely sure that you did not?

A. Absolutely sure.

Q. Why are you so positive about it?

A. For the reason it bears the earmarks of having been prepared in another office.

Q. But you are not prepared at this time to tell this jury whether or not they phoned to you at that time or not?

A. No, sir, they were not in the habit of phoning generally; they did sometimes.

Q. They did sometimes? A. Yes.

Q. Well, tell me the next item.

A. 79. This is not the Storekeeper's copy, but I don't need that, other earmarks I didn't remember of, and it was not prepared in our office.

Q. It was not prepared in your office?

A. No, sir.

Q. Take a look at the next one, then?

A. Neither was this prepared in our office.

Mr. SHIPLEY.—Which one is that? A. 81.

(Testimony of Edwin F. Meyer.)

Mr. ALLEN.—That is Plaintiff's Exhibit "67"?
[1117—1065]

A. That is Plaintiff's Exhibit "67," requisition 81.

Q. Do you recall now whether or not they phoned to you or made inquiries in regard to that price?

Mr. MORRIS.—Is that requisition 81?

Mr. ALLEN.—Yes, sir.

Mr. MORRIS.—What is the exhibit number?

Mr. ALLEN.—"67."

A. I am not prepared to say at this time.

Q. You don't know whether they did or did not?

A. I am not prepared to say.

Q. They may have done so; is that right?

A. Oh, there is a possibility.

Q. Yes. A. It is quite a number of years ago.

Q. Calling your attention to Plaintiff's Exhibit Number "14," which is requisition number 649, did you prepare that requisition in your office?

A. This was prepared in our office, yes, sir.

Q. Did you personally prepare that requisition?

A. I can't say. Just a second—I can't say whether I personally prepared it or not.

Q. Did you ever direct or cause to be prepared that requisition 649,—I think it is?

A. I caused it to be prepared; it was prepared in our office.

Q. You caused it to be prepared and you fixed the estimate in that requisition, did you not?

A. The same procedure, yes, sir.

Q. You fixed the estimate of 40 cents a pound on that particular kind of bronze, did you not?

(Testimony of Edwin F. Meyer.)

A. Yes, sir, I say I did. It was done in the regular course of [1118—1066] business. I may not have fixed it, but I am willing to accept the responsibility.

Q. You are responsible for the fact?

A. Not any more responsible than others in the office, but I accept the responsibility.

Q. You accept the responsibility?

A. I accept the responsibility, yes, sir.

Q. And in this particular case, look at the exhibit and tell the jury at what price it was awarded and to whom in each case?

A. You refer to toban bronze particularly, of course?

Q. I do, yes.

A. Great Western Smelting & Refining Company got several items there since, 9, 10 items at 50 cents per pound, 10 cents a pound in excess of the estimate.

Q. That was awarded to the Great Western Smelting & Refining Company, of which our friend Mr. Goldberg is manager, is that right?

A. You said our friend, sir.

Q. Well, Mr. Goldberg, then? A. Yes, sir.

Q. What was the delivery made as shown by that record by Mr. Goldberg's concern, by the Great Western Smelting & Refining Company? First tell me the number of pounds awarded to the Great Western.

A. You want the total number of each item?

Q. No, I want the total number of pounds awarded to the Great Western?

A. I will have to do a little computation here.

(Testimony of Edwin F. Meyer.)

Q. Very well, go ahead.

A. 755 pounds, as near as—if I make it correct.
[1119—1067]

Q. 755 pounds, then, was awarded to the Great Western Company. How much was delivered there under their award?

A. I have some more computation here. You mean how many pounds delivered or claimed to have been delivered?

Mr. ALLEN.—How much did they deliver, claim or deliver either?

A. Well, there might be—it might be two separate amounts.

Q. How much did they deliver, then?

A. Well, they claimed to have delivered 935 pounds. Now, the Inspection Call—

Q. Look for another Inspection Call and see if you don't find one for 1497½ pounds, Mr. Meyer.

A. Beg your pardon, sir.

Q. Look for an Inspection Call and see if you don't find one for 1497½ pounds.

A. I only find—oh, yes, there are two Inspection Calls here. One was cancelled. I find none for the quantity you speak of.

Q. What is that, fourteen hundred and how many pounds (showing)? A. Well,—

Q. Get the other Inspection Call. You have got the wrong one there.

A. I think you have the wrong one in mind. It is another folder you have in mind, isn't it?

Q. Will you find that Inspection Call for me, Mr.

(Testimony of Edwin F. Meyer.)

House? If there are two Inspection Calls there they would both come out of your office, wouldn't they?

A. Correct, sir.

Q. What is that Inspection Call, how much (showing)?

A. Well, I would have to compute that. Let me have something to write on. Well, there are a lot of fractions here and it will take some time to add it; the figures are irregular, too, if [1120—1068] you can simplify this in any way, shape or form, the figures are very irregular.

Q. It shows 1497½ pounds. You run over that and see if it is correct.

A. I will concede that. Yes, sir, it is approximate.

Q. Have you run over that at some other time to check it up?

A. No, I have not, but I concede that.

Q. Thank you very much. If there was 1497½ pounds of toban bronze delivered there and the original requisition was for 755, there was a considerable excess there on hand, was there not, Mr. Meyer? A. Yes, sir, there would have been.

Q. Now, with this bronze lying there in Bremer-ton; if it was taken away from the yard, what officer in the Storekeeper's Office would deliver the pass which would take it out, or take it away from the yard so it could be removed?

A. What officer?

Q. What officer, or subordinate officer, including yourself?

A. Why, at that time I don't think any passes were

(Testimony of Edwin F. Meyer.)

necessary to get it out.

Q. As a matter of fact,—

A. I don't recall. I think there were materials being shipped back as soon as it was rejected on a contract.

Q. Refreshing your recollection, at that time, as a matter of fact, didn't you issue passes for taking material rejected away from the yard—did you or did you not? A. I don't think I did.

Q. Well, will you say that you did not?

A. I don't think passes were required.

Q. You don't think they were required? [1121—1069] A. No, sir.

Q. If they were required you were the man who issued them?

A. Yes, I would be, if required, but they were not issued. I remember issuing very few passes.

Q. You testified yesterday a small amount was awarded to the Whiton Hardware Company at thirty cents. Refreshing your recollection, doesn't it aggregate \$279 worth?

A. Did I say—I don't know that I said a small amount.

Q. Well, as a matter of fact, it isn't a small amount?

A. \$275 is a small amount as compared with the other.

Q. That is 900 pounds of bronze at thirty cents a pound? A. Yes, just about.

Q. It is about right? A. Yes, sir.

Q. Then thereafter a new requisition appears,

(Testimony of Edwin F. Meyer.)

which is numbered Plaintiff's Exhibit Number "16."
Was that requisition instituted by you, Mr. Meyer?

A. Yes, sir, it was instituted in my office.

Q. In your office? A. Yes, sir.

Q. I want you to take these two requisitions, the one I have just shown you and this one (showing), and tell the jury how they approximately compare with regard to the excess left there by Mr. Goldberg's concern and the amount of this material called for in this new requisition.

A. This takes up the excess delivery (showing).

Q. This takes up the excess delivery?

A. Yes, sir.

Q. State to the jury what price you estimated or placed upon this new purchase by the United States Government. [1122—1070]

A. The estimate was placed on it at 50 cents.

Q. Did you place that estimate on there?

A. It was probably done under my general supervision.

Q. You were responsible for it, aren't you, Mr. Meyer? A. I accept it, sir.

Q. You are not trying to avoid the responsibility?

A. No, sir.

Q. If the United States Government could purchase it from the Whiton Hardware Company at thirty cents it was all right for that United States Government to buy it at 50 cents?

A. No, sir, the United States Government reserved the right to purchase it for thirty cents in this case. The estimate is not a guide to the purchase.

(Testimony of Edwin F. Meyer.)

Q. It wouldn't go above that purchase more than ten per cent?

A. It could not, no, according to the interpolation of the law at that time.

Q. And you knew if there was anything improper on the other side of the sound, that this high price would facilitate the matter, did you not, at that time?

A. Not anything wrong on this side of the Sound; no, sir.

Q. If there was anything wrong, Mr. Meyer, you knew this high estimate would help things over here?

A. No, sir, I didn't know that.

Q. As a matter of fact, from your wide experience, don't you know that is true?

Mr. SHIPLEY.—Your Honor, he is arguing these things to the witness, or trying to have this witness argue the case to the jury.

The COURT.—Yes, that is argument. [1123—1071]

EDWIN F. MEYER on the stand.

Cross-examination (Resumed).

(By Mr. ALLEN.)

Mr. ALLEN.—Your memory is sufficiently good that you are able, after a period of some years, to direct to Mr. House, the representative here of the United States Government, requests for particular requisitions, calling them by number, and even giving the date; isn't that true?

A. In some instances, yes, sir.

Q. In many instances, isn't that true, Mr. Meyer?

(Testimony of Edwin F. Meyer.)

A. Why, I don't know exactly what you mean by many. I think in some instances I have.

Q. From your experience with men, both in a business way and as you have met them in life, haven't you rather a remarkable memory, as a matter of fact?

A. I have a fairly good memory. The term remarkable is rather—

Q. Yes. Is it not, as a matter of fact, remarkable as regards fixing in your mind numbers and dates and other matters of that kind?

A. Again I question remarkable.

Q. I mean, when I use the word "remarkable" I mean as compared with the general run of mankind?

A. I can't say as to that. I think I have a fairly good memory; I can't say as to the—

Q. You think you have a fairly good memory?

A. Yes, sir.

Q. Something was said in your direct examination with regard to the \$500 limit beyond which you could not go without securing the [1124—1072] approval of the Secretary of the Navy. I believe that something was said in that connection in regard to the year 1909 and '10. I will ask you now, Mr. Meyer, whether it was your intention to leave with the jury or with myself the thought that this \$500 limit was not in force in the month of January, February, March and April of 1908.

A. As far as I know, it was always in force.

Q. It was in force in 1908 as well as in 1909, 10 and 11?

(Testimony of Edwin F. Meyer.)

A. I think that is the statutory limitation.

Q. Yes, sir. As a matter of fact, I think it was passed in 1907, but it was in force in 1908 at least.

Mr. SHIPLEY.—I think the question in your mind is when the “L” requisition came in.

Mr. ALLEN.—Yes. I didn’t want any confusion in the minds of the jury.

Q. In other words, in the fall of 1908, as well as 1907, the same law was then in force which limited the power of the local Storekeeper at Bremerton to purchase above the sum of \$500, so that in the event he wanted to purchase stock material in the open market he was then required to get the positive orders of the Secretary of the Navy; is not that true?

A. For anything over \$500; yes, sir.

Q. Yes, sir, that is as I so understand it. Some reference was made, Mr. Meyer, in your direct examination, to a requisition, a particular requisition, which was directed out of your office down through the medium of the Mare Island Navy Yard, and thereafter purchased, I think, in the markets of Seattle. As a matter of fact, wasn’t it true that after Mr. Spear came on the yard that many requisitions were routed in that way, because of Mr. Spear’s familiarity with the stock of the Mare Island Navy [1125—1073] Yard?

A. No, sir, that isn’t true in that sense.

Q. As a matter of fact, were not many of these requisitions routed in that way because of the fact he had come from the Mare Island Navy Yard and was more or less familiar with ~~their~~ stock?

(Testimony of Edwin F. Meyer.)

A. Not in that way, no, sir; it didn't occur in that way.

Q. What do you mean by that way?

A. Well, it was after the battleships were at the navy yard when we took up that matter, and, for the sake of expediting the receipt of stores on our requisitions we obtained the permission of the Bureau at Washington to route these requisitions by way of Mare Island.

Q. Mare Island Navy Yard is located very close to the city of San Francisco, is it not? A. Yes, sir.

Q. Within a few miles. When the fleet, Atlantic Squadron, battleship squadron, approached on this journey around the world it first touched in at the city of San Francisco, did it not?

A. I don't know whether it touched there or not.

Q. It came on up the coast, didn't it, Mr. Meyer, and that part of it which came to the city of Seattle returned again, then, to the city of San Francisco, which was the rendezvous of the entire fleet?

A. After they left here?

Q. They returned again to San Francisco, and there all of the ships assembled and proceeded from San Francisco to an Oriental cruise, isn't that true?

A. Around the world; yes, sir.

Q. So then any ship of the Atlantic Battleship Squadron which was a [1126—1074] part of that Atlantic Fleet would have three opportunities to obtain supplies after they left the harbor of Santiago. They would touch first at Mare Island on the way up, and touch the Puget Sound Navy Yard here, and re-

(Testimony of Edwin F. Meyer.)

touch the Mare Island Navy Yard before they started for the Orient.

A. That is only part true. If the navy yard ordered a ship furnished with supplies at Puget Sound it would be expected the supplies would be put on board here. If, however, by means of any exigency, we couldn't supply them here, they probably would take it on at San Francisco.

Q. Mr. Meyer, is not the course of a battleship in reference to supplies much like that of your own personal procedure in the purchase of groceries? If a battleship goes to one navy yard and there doesn't find the supplies, it can proceed, if that is but a few miles, proceed to the next navy yard and there take up the supplies it is unable to procure at the former yard?

A. You don't understand the military life.

Q. I have seen something of it personally.

A. No, sir, that isn't true. It is in some instances, as I explained. If the articles were not available here a special provision might be made for it to be put on board in San Francisco harbor, but that would involve quite a bit of routine work.

Q. Yes, sir. The point is this, Mr. Meyer. If the battleships which came into the Puget Sound harbor were unable to obtain 12 by 16 by $\frac{1}{2}$ inch zinc, and they were returning thereafter to San Francisco, and in near proximity to Mare Island Navy Yard, they could have there obtained, if there was a shortage here, they could have obtained whatever shortage

(Testimony of Edwin F. Meyer.)

they had here at the Mare Island Navy Yard?
[1127—1075]

A. Yes, they could have under those conditions, but the Puget Sound Navy Yard was directed to supply those items and we were not supposed to depend upon Mare Island to supply them.

Q. Something has been said in your direct examination with reference to the knowledge which was given to the community, and to your own intelligence as well, with regard to the movements of this Atlantic Battleship Squadron. Refreshing your recollection, I will ask you whether or not it was not known to you that the Atlantic Battleship Squadron would leave the Atlantic Coast a year before it actually left there?

A. Why, I think we had information some considerable time before. I don't know—

Q. Mr. Meyer, you read the Seattle daily papers, do you not? A. I do, sir.

Q. Do you read the Seattle "Post Intelligence"?

A. Yes, sir.

Q. Do you read the Seattle "Times"?

A. Yes, sir.

Q. Did you read the Seattle "Times" about the month of July, 1907, calling your attention to a particular item—

A. I can't say I did. I probably did.

Q. Step down here a moment, please. Calling your attention to an article of July 2d, 1907, published in the Seattle "Evening Times," under glaring headlines: "Big shoot. Pacific Fleet. Government

(Testimony of Edwin F. Meyer.)

prepares for war—”

A. As a matter of fact, the daily press gets information before we do. I probably had that information; I don't know; that has no bearing on this matter whatever.

Q. Well, that is a matter probably for us to determine, but, Mr. Meyer, you probably had that information at or about that time? [1128—1076]

A. I concede that I may have; I don't recall.

Q. And later, on July 5th, 1907, Mr. Meyer, I call your attention to this article in “The Times,” which confirms, or purports to confirm—will you kindly take a look at it, please?—which confirms, or purports to confirm, the intelligence of two days before. If you read the daily papers, those officials at Bremerton, as you were one, you probably had this information from a public source if you didn't have it from an official source; isn't that true?

A. Chances are I did.

Q. Now, I believe you stated in your direct examination that you received intelligence about the first of April as to the time when these ships would actually arrive in the Seattle Harbor; is that right?

A. Why, I can't say as to that; I didn't testify as to that.

Mr. MORRIS.—What ships do you refer to?

A. (Continuing.) The coming of the fleet here did not necessarily mean that the Puget Sound Navy Yard would outfit them. The Mare Island Navy Yard was the base of supplies.

Q. You were asked, as I understand, as to your

(Testimony of Edwin F. Meyer.)

knowledge of the movements of the ships of the Atlantic Battleship Squadron which would come to the harbor of Puget Sound, and I believe you stated that the intense activity which marked your yard really began on or about April 1st, that then you had definite knowledge as to when the ships would be in the harbor of Puget Sound?

A. As to the assembling of supplies for the battleships. That had reference to nothing else.

Q. As to the assembling?

A. As to the assembling of those ships.

Q. That was on or about April 1st? [1129—1077]

A. That was on or about April 1st we began the assembling of the supplies, yes, sir.

Q. As a matter of fact, isn't it true, Mr. Meyer, that as early as March 13th, 1908, you had, in the daily press of this paper, had positive and direct information as to what dates each of those ships would arrive on the harbors of Puget Sound, as early as March 13th? A. We may have, yes, sir.

Q. So, on April 1st,—I will call your attention first to this article in the paper and see if that refreshes your recollection, calling your attention to that part of—"The Battleships would remain in San Francisco until about May 22d," which is an article of March 13th, 1907. Your information was probably as complete as that of the public press, was it not, at that time?

A. The press would have the information, I think, in that particular before we got it.

Q. Probably you read all the matters in regard

(Testimony of Edwin F. Meyer.)

to the movement of that fleet? A. I assume I did.

Q. So your information was complete on March 13th, 1908, that the ships would leave San Francisco for Puget Sound on May 22d, 1908?

A. You can't regard the newspaper information as anything definite. Even though I had read that and had the information at the time, I wouldn't consider that as official; I would have to get the official information from the Navy Department.

Q. When did you get your official information, then?

A. The records would have to show that. I don't recall, Mr. Allen.

Q. I am asking you as to your personal recollection in regard to [1130—1078] it.

A. My personal recollection is it was about the time that I began the assembling of these stores, and the records show that was started some time about the first of April. For example, we have here a folder showing that steps were taken to procure provisions. Well, the provisions, I think, were about the first things that we tried to secure, that being an important element.

Q. Mr. Meyer, don't you know, and didn't you know, that Paymaster Spear came from Mare Island Navy Yard to take charge of the Storekeeper's Office at Bremerton for the very purpose of then beginning, in January, 1908, of preparing for the approach of this battleship fleet?

A. No, sir, I did not.

Q. You do not know that fact?

(Testimony of Edwin F. Meyer.)

A. I did not know it.

Q. You heard the statement of Paymaster Spear; he was sent here for that fact?

A. I heard him, but he did not tell me that at that time. In fact, the Paymaster that Paymaster Spear relieved was not very well and he was trying to get on the retired list.

Q. But you are telling the jury now you didn't know Paymaster Spear came there so as to meet the needs and requirements of the Atlantic Battleship Squadron?

A. No, sir, I didn't know that fact.

Q. As a matter of fact, the United States Government was, beginning prior to January 1st and continued down through January, February, March and April, and even into May, during all those months they were loading up supplies at the Puget Sound Navy Yard to supply that fleet, were they not?

A. Not that I am aware of, sir. [1131—1079]

Q. Didn't you begin to requisition for a full car of zinc way back in December, 1907, and wasn't that actually delivered on March 9th, in anticipation of this increased demand to be made on the Puget Sound Navy Yard?

A. You say increased demand. It was for the Pacific Fleet in December.

Q. (Question repeated.)

A. That is a double-barreled question. I know what the question is; there is no use to read it.

The COURT.—Read the question. (Question repeated.) What was your objection, Mr. Shipley,

(Testimony of Edwin F. Meyer.)

your suggestion in relation to this last question?

Mr. SHIPLEY.—The suggestion was this, your Honor: The counsel, up to this point, has been interrogating with reference to the Atlantic Fleet, as I understood the question. We desire to know if this last question is provisions made in anticipation of the Atlantic Fleet, or to conditions which were brought about also by the expected arrival of the Pacific Fleet?

The COURT.—Let the witness answer.

The COURT.—No, I think the witness would know, knowing of the conditions, he could say.

Mr. SHIPLEY.—Exception.

A. It was in anticipation of the arrival of the demands of the Pacific Fleet, not the arrival, because they were there at the time.

Mr. ALLEN.—Yes, you knew, and the public knew, way along in July, 1907, six months before this requisition started, knew that the Atlantic Battleship Squadron yourself would be in the port of Puget Sound in the coming spring and summer.

A. It didn't follow that the Puget Sound Navy Yard, with its [1132—1080] limited facilities, would take care of those ships. Mare Island was the base of supplies, and prior to that time we were all getting our supplies from Mare Island.

Q. You had as much definite knowledge of the movements of the Atlantic Battleship Squadron in December as you had of the Pacific Squadron, didn't you, at the same time?

A. The Pacific Squadron, for the most part, was

(Testimony of Edwin F. Meyer.)

at that time at the Puget Sound Navy Yard; could not have had as definite information, sir.

Q. And the Pacific Squadron got its supplies at Mare Island whilst here?

A. A great many supplies.

Q. And they could get zinc as well?

A. We had trouble of not furnishing them with zinc, and this requisition on the Bureau was initiated for the purpose of avoiding these numerous purchases in this local market.

Q. You could get zinc as well at the Mare Island Navy Yard as you could at the navy yard at Bremerton for the Pacific Fleet, couldn't you?

A. The zinc manufacturers are in the middle west, and it could be obtained from these people at Puget Sound as readily as it could be obtained at Mare Island. Prior to this time the zincs were shipped to Mare Island and shipped up from Mare Island to Puget Sound with increased freight.

Mr. ALLEN.—Mr. Meyer, you did start a requisition, then, in December, 1907, for a full car of zinc, and you then estimated the price at 10 cents a pound, didn't you? A. I did, sir.

Q. And if you had looked up the market at that time you would have found that zinc was quoted and sold by Matheson & Heggler [1133—1081] people at eight cents a pound in August or September of that same year, wouldn't you?

A. You understand that I wasn't concerned with the price paid. The quantity of supplies is the thing that concerned me at that time.

(Testimony of Edwin F. Meyer.)

Q. You weren't concerned, then, in December, with the price to be paid at all? A. No, sir.

Q. To your mind it doesn't make any difference whether you put ten cents on it or twelve or fourteen? A. Absolutely no difference.

Q. You thought you were performing your service to the Government if you made an estimate of sixteen cents as well as if you had made an estimate of ten? A. Yes, sir, I think that is right.

Q. When you were placed there to make these estimates for the United States Government you thought you were doing your duty if you said 16 cents instead of ten; is that right?

A. As far as the purposes were concerned, it would serve the same purpose.

A. This purchase is made by the Navy Department at Washington, D. C. Their offices are of very high rank in the navy, bonded, and they are the people who are interested in the purchase. I had absolutely nothing to do with that, I had only to do with the quantity.

Q. But you have already testified, and so have other witnesses here, and it is one of the indisputable facts of this case, that if you fixed a certain estimated value they would not exceed that except by ten per cent. Then if you had fixed ten cents a pound upon the requisition of April 1st, 1908, they [1134—1082] wouldn't have sold this zinc to the Government at twelve forty-five, would they?

A. If the estimate had been placed at a dollar a pound the Purchasing Pay Office was charged with

(Testimony of Edwin F. Meyer.)

the purchase of that at the lowest figure. I had absolutely nothing to do with that.

Q. Read him the question. I want you to answer my question.

(Question repeated.)

Mr. MORRIS.—Object to the question, may it please your Honor, on the ground it contains a statement which is alleged to be a fact, which is not borne out by the record in this case. The undisputed facts in this case show just the reverse, and it is argumentative, and we move to strike the questions from the record.

The COURT.—I think the first part of that question should be eliminated, as to the undisputed facts.

Mr. ALLEN.—Well, that was an explanation. Read the latter part of the question.

Mr. MORRIS.—We further object to the question on the ground it simply calls for a conclusion of this witness.

The COURT.—Yes, but then this is cross-examination, and he can answer that.

Mr. MORRIS.—Exception.

Mr. ALLEN.—Read the question.

Q. (Question repeated.)

A. They could sell zinc to the Government at any price they wanted.

Q. If they did exceed this ten per cent they would then exceed the other limit placed upon their action above your estimate; isn't that true?

A. The article could be purchased by authority of the Navy Department at any price irrespective of

(Testimony of Edwin F. Meyer.)

the estimate, sir. [1135—1083]

Q. You have testified heretofore, I now call your attention to it, have you not, or have you not heretofore testified that it was the rule and custom to never exceed, except a possible limit of ten per cent above the estimated price which you placed upon the proposed purchases?

A. Yes, sir, that is as a guide to the accountant.

Q. As a guide to the accounting system?

A. Yes, sir.

Q. And wasn't it a guide to the Purchasing Pay Officer?

A. No, sir, it was not a guide to the Purchasing Pay Officer.

Q. You mean to say he wasn't limited?

A. As to his purchase, he could purchase it at the lowest possible price in the market.

Q. You mean to say the Purchasing Pay Officer in Seattle, who purchased this material, didn't use the figure which you set there on the face of the requisition as a guide to direct and control his action in purchasing that article?

A. No, sir, he should not.

Q. As a matter of practice, didn't he?

A. He should not; I don't know what his practice was.

Q. You don't know what his practice was.

A. I do know he was sent there to purchase it at any price which he sees fit.

Q. Your idea on all of these purchases was it didn't have any control on any of those?

(Testimony of Edwin F. Meyer.)

A. It was a guide to Washington, D. C., to see that it was limiting the Government's obligation.

Q. But it wasn't any check on the Government's purchases, and wasn't intended to be?

A. As a secondary matter, and for the purpose of the primary object, the Purchasing Pay Officer was not authorized to exceed it more [1136—1084] than ten per cent.

Q. Don't you know, as a matter of fact, if it exceeded ten per cent of the proposed purchase, it exceeded ten per cent, it was a rule and custom, and they followed it absolutely, they must take it up with the Paymaster at Bremerton before they purchased it, and don't you know that?

A. The Paymaster at Bremerton couldn't authorize it over ten per cent; it required the action of Washington, D. C.

Q. You answer my question.

Mr. SHIPLEY.—We submit the witness has a right to complete the answer.

Mr. ALLEN.—Read the question.

Q. (Question repeated.)

A. Not the Paymaster at Bremerton; the Bureau at Washington is the person to authorize that. And some Pay Officers hold that ten per cent is not binding upon that.

Q. I am asking you about the custom that was in force and effect in 1908, in the months of January, February, March and April.

A. Your first question was broader than that.

Q. I am confining it now to those four months, if

(Testimony of Edwin F. Meyer.)

you please to have it that way.

A. As you have it, not as I please to have it.

Q. I am now confining you to those four months, and state what the practice was.

A. The rule was in the Paymaster's Office at that time he would not exceed the estimated cost at more than ten per cent without authority from Washington, D. C.

Q. You have not stated whether he would consult the Paymaster at Bremerton?

A. When you refer to the Paymaster you refer to the Storekeeper? [1137—1085]

Q. I mean the Paymaster in charge of the Storekeeper's Office.

A. There is a Paymaster at Bremerton and also a Storekeeper.

Q. You understand exactly what I mean. I mean the Paymaster in charge of the Storekeeper's Office.

A. These papers—when an estimate is exceeded these papers are referred to Washington, D. C., frequently via the Storekeeper for recommendation; I think in most instances by way of the Storekeeper for recommendation—

Q. Frequently—

Mr. MORRIS.—Let him answer.

A. (Continuing.) The Storekeeper could not authorize it. He could suggest or recommend to the Department at Washington that the estimate be exceeded. In those cases they are always called upon to make an explanation why the estimate was not placed high enough, therefore I aim to make the

(Testimony of Edwin F. Meyer.)

estimate in all cases sufficiently high to preclude the possibility of a call-down for having made a low estimate.

Mr. ALLEN.—I now understand from your explanation that then it was the practice and procedure for this matter, when it exceeds ten per cent, to immediately be referred, by way of the Bremerton Office, to the officers at Washington?

A. Yes, sir.

Q. For some explanation? A. Yes, sir.

Q. In other words, they did consider it as a serious matter if this purchase was made in excess of ten per cent of your estimated price?

A. Considered it a serious matter if I underestimated the cost.

Q. They considered it so serious a matter that the purchase of that supply was immediately stopped, when it exceeded ten per cent, [1138—1086] until it had gone through the navy channels, through the Bremerton office and back to Washington?

A. Naturally they wouldn't exceed the amount appropriated by the authorities at Washington.

Q. So your estimate placed upon that requisition did have a great deal of value for some officer over here in the city of Seattle, didn't it?

A. Only as far as a limitation; he couldn't exceed it. It was his duty to buy it, after competition; at the lowest price, and in that I had absolutely no concern at all.

Q. You were at one time enough interested in a form of complaint, I believe, made by the Great

(Testimony of Edwin F. Meyer.)

Western Smelting & Refining Company, to your office in regard to the scales in use in the metal storehouse. I believe you stated that you went down and saw Mr. Lockwood in regard to the proper condition of his scales, did you?

A. I did, yes, sir. I recall having—

Q. And you told him that you thought probably his scales were wrong on this occasion, as I understand it?

A. Well, I don't know whether in those words.

Q. But in effect?

A. But I questioned whether or not the scales were—

Q. You questioned the accuracy. Can you give the name of any other merchant in the city of Seattle for whom you went to Mr. Lockwood in regard to the condition of his scales during this period of 1908?

A. Well, this was a condition existing about that time. Now, I recall several shortages. We were not receiving very many materials or shipments from Seattle people; our shipments were principally from the east, and if you will investigate the [1139—1087] records about that time you will find that a large number of shortages occurred.

Q. Mr. Meyer, you probably didn't understand me. I asked you if you would give me the name of one other merchant on whose complaint you went and jacked up Mr. Lockwood about the condition of those scales other than the complaint from the Great Western Smelting & Refining Company. Name one or two so we will see.

(Testimony of Edwin F. Meyer.)

A. Well, I don't recall any just now.

Q. You don't recall any at this time? A. No.

Q. I thought not.

A. I might, by referring to the records, find a number of shortages.

Q. To what other merchants in the city of Seattle did you ever write on any occasion a letter on which you signed the name of Ray Spear, Paymaster of the United States Navy?

A. Why, I wrote to any number of people.

Q. Name a few of them.

A. Well, Mr. Allen, you understand that there are days over there when you have a large number of letters forwarded, and if Paymaster Spear at that time happened to be out of the office, and the matters were immaterial, I made it a rule to send the correspondence out without holding it up.

Q. Now, you testified in your direct examination, and you now reiterate it, you made it a rule, it was a custom, then, to sign the name of Paymaster Spear, his name written out, to communications emanating from your office and directed to merchants of Seattle or elsewhere. Name one or two or three merchants in this city to whom you addressed epistles of that kind with the signature of Ray Spear attached to them.

A. This was five years ago, and those things were mere routine; [1140—1088] I can't remember as far back as that. The original correspondence would be in the files of these various dealers.

Q. Can you go through these files and find any let-

(Testimony of Edwin F. Meyer.)

ters in which the signature of Ray Spear is attached written by you except one of them?

A. In none of them I find in these. These were brought in court by Mr. Goldberg. The files do not show them, they are blank always.

Q. I was asking you to help us in our investigation of what merchant you might, on some other occasion, other than the Great Western—a letter to which you signed the name of Ray Spear.

A. You would have to find the files of the merchants about that time. I think you will find that any letter that was dated in the Storekeeper's Office about the same day that this letter was dated, you will find that all such letters, perfunctory, just merely routine letters, you will find them signed in exactly the same way.

Mr. ALLEN.—As a matter of fact, you didn't write this letter to Mr. Jimmie Goldberg to show him how strong you were over in the office?

A. I don't know Mr. Jimmie Goldberg, and furthermore, he wouldn't know whether that was the Storekeeper's signature or I wrote it.

Q. If a man who did business with you and was accustomed to see this "M" with a cross across it that way, he would likely know who wrote it?

A. He was in the office enough to know who wrote all the letters there. He was frequently in the office conferring with Paymaster Spear and conferring with me.

Q. When do you claim Mr. Spear objected to you using his name that way? [1141—1089]

(Testimony of Edwin F. Meyer.)

A. I don't claim he objected to that at all.

Q. *Do claim* Mr. Spear, who is sitting here in front of you, had any *know* of that until the other day here in court? A. I don't know.

Q. You never told him about that?

A. It wasn't necessary; it was a matter of routine in the office.

Q. Don't you know, as a matter of routine in the office, it was your duty to sign your name as Principal Clerk?

A. I never have, in my sixteen years with the Government, never signed my name as Principal Clerk.

Q. Don't you know it is a custom, when you use the name of Paymaster, to use a rubber stamp which didn't have it written out?

A. If I had a rubber stamp of his name I probably put it on there, but a rubber stamp wouldn't serve any more purpose than writing it in there with my initial after it.

Mr. ALLEN.—Calling your attention to Plaintiff's Exhibit Number "102" and plaintiff's exhibit—

The COURT.—There is no Plaintiff's Exhibit "102."

Mr. ALLEN.—That is right. Plaintiff's Exhibit "35," the Lyman-Evans transaction, to which reference has been made. Take a look at all of those three folders. This is requisition of January 2d, 1910, that is the date, is it not, Mr. Meyer?

A. January 20th.

Q. January 20th, 1910. This is requisition for ferromanganese to a certain Lyman-Evans concern;

(Testimony of Edwin F. Meyer.)

is that true? A. Yes, sir.

Q. What is the amount of the original requisition?

A. \$500.

Q. What is the number of pounds called for?

[1142—1090] A. 4,000 pounds.

Q. 4,000 pounds of ferromanganese. What is the comparative date of the requisition for 4,500 pounds of ferromanganese which follows immediately thereafter? A. No requisition for 2,500.

Q. 4,500 or 4,000, the second requisition for 4,000?

A. March 19, 1910.

Q. March 19, 1910. That is two months thereafter. Each of those is for 4,000 pounds; is it not?

A. Yes, sir.

Q. You heard the testimony of Mr. Kettlewell in this case to the effect that you and he went down by the telegraph office and he sent a telegram to a concern in the east with reference to the cost of this ferromanganese, did you not?

A. I heard his testimony.

Mr. MORRIS.—We object to that testimony. To my recollection there is no such evidence in this case.

Mr. RIDDELL.—The witness has already answered that there was.

Mr. MORRIS.—We move to strike the answer.

Mr. ALLEN.—Did you hear that?

A. I imagine he did; I imagine he testified to anything you said he did, and if you said he did, he did.

Q. That is quite a compliment to my memory. As a matter of fact, did you hear that statement by Mr. Kettlewell or not?

(Testimony of Edwin F. Meyer.)

A. Mr. Morris said it wasn't said.

Q. I am asking you about your good memory, Mr. Meyer.

A. It creates a doubt in my mind now whether I heard it or not.

Q. Well, did you think you heard it?

A. I thought I heard it; yes, sir.

Q. Well, if Mr. Kettlewell then testified that he and you went [1143—1091] down by the telegraph office, and a telegram was sent to an eastern concern, a few days after the original award was made to this Lyman-Evans & Company, then if there was not a Lyman-Evans & Company in St. Louis—if there was a Lyman-Evans Company in St. Louis you would naturally, by means of correspondence, keep in touch with them through the course of this transaction, would you not?

Mr. SHIPLEY.—We object to the question as not a fair question. It is assuming that the statement that Kettlewell made was true and that this witness admits the statement to be true. The question is based on "Did you hear the evidence of Mr. Kettlewell." Now, this witness may say that evidence is false, so you can't assume the truthfulness of Kettlewell's testimony in this case and then base on that a question, if you heard Mr. Kettlewell then such and such fact must have resulted.

The COURT.—I think the question as it is propounded now should be answered. He may answer. Note an exception. There was no assumption there.

Q. I will call your attention to this fact, then, that

(Testimony of Edwin F. Meyer.)

after the original requisition was made and the delivery was made, I will ask you to ascertain from those records the number of pounds of ferromanganese that was delivered to the navy yard at Bremerton.

A. Why, I remember that transaction very well.

Q. You do?

A. Yes, sir. It was gone into very fully at the last trial.

Q. Yes.

A. 4,350 pounds on one and 4,400 on another, making a total of 8,750 pounds.

Q. Referring to the date of the delivery of the original requisition, which started on January 20th, 1910, I will ask you [1144—1092] whether it isn't the fact that you started a second requisition for 4,000 pounds of ferromanganese before that first requisition was delivered? A. Yes, sir.

Q. Taking, now, requisition number 193, plaintiff's exhibit—you started on January 4th, 1907, a requisition which was known as requisition number 193, a requisition for 4,000 pounds of zinc plate of the size of 12 by 1½ by 6 inches? A. Yes, sir.

Q. You testified that you prepared that requisition?

A. No, I wouldn't say I prepared it. It was prepared in the Storekeeper's Office.

Q. Well, you caused it to be prepared, I believe you stated? A. Yes, sir.

Q. And the estimated price there is 12 cents?

A. 12 cents.

Q. That was furnished by you, I believe you stated.

(Testimony of Edwin F. Meyer.)

I call your attention to the letter first ascertained in that folder, the time of the delivery of this 4,000 pounds of zinc. What is the exhibit number, Mr. Meyer, on the back of that, if you please?

A. "17" is one and "18" the other. They both pertain to 193.

Mr. SHIPLEY.—One is the Storekeeper's folder and the other is the navy pay?

Mr. ALLEN.—Yes.

A. What was the requisition, please?

Q. (Question repeated.)

A. December 14th, 1907.

Mr. MORRIS.—Which folder, Mr. Meyer?

A. That is shown in this yard folder "17."
[1145—1093]

Mr. ALLEN.—The amount of the requisition was 4,000 pounds. State from the folder what was the amount delivered. A. 5,930 pounds.

Q. That is an excess delivery of 1,933 pounds, or nearly 50 per cent, isn't it, Mr. Meyer?

A. Yes, sir.

Q. There was then an inspection of this delivery, was there not?

A. Yes, sir, an inspection was called and sent to the Board of Inspection.

Q. I will call your attention to a letter, which is a part of the files of that case, written from Paymaster Orr's office in the city of Seattle. Tell the jury the exact procedure of that letter. To whom is it addressed?

A. Well, you jump from the Inspection Call to the

(Testimony of Edwin F. Meyer.)

letter. Do you want me to follow it up or—

Q. You tell me about the letter.

A. The letter is dated January 11th, 1908. It is written by the Purchasing Pay Officer, Seattle, to the Commandant of the navy yard.

Q. To the Commandant of the navy yard. Forwarded through his office, then, is that right?

A. Yes, sir.

Q. That was referred then to whom?

A. To the Storekeeper.

Q. That is, Mr. Spear's Office?

A. Yes, sir, by the Storekeeper to the Board of Inspection.

Q. In this letter the office at Seattle protests against the purchase of this material at this exorbitant price; isn't that true?

A. No, sir. [1146—1094]

Q. Read the letter to the jury, then.

A. (Reading:) I have the honor to return herewith General Storekeeper's voucher number 506, dated January 7th, 1908, in favor of the Great Western Smelting & Refining Company, in payment for 5,933 pounds of zinc plates, delivered under Naval Supply Fund requisition number 193, inviting attention to the fact that this office placed an order for but 4,000 pounds of zinc plates under this requisition. This was an emergency purchase for immediate delivery, a part of the material being shipped by express, the contractor informed me at the time, and consequently the price was abnormally high.

It would therefore appear, in accepting more than

(Testimony of Edwin F. Meyer.)

4,000 pounds, the Government will pay an excessive price for the over-delivery. Very respectfully, Robert H. Orr, Paymaster U. S. N. Addressed to the Commandant.

Q. After that reached the Commandant's office this complaint, then, which emanated from Mr. Orr's office down here, that was then referred to Mr. Spear's office and passed to your hands; is that right? A. Yes, sir.

Q. And calling your attention to a certain endorsement, the endorsement of Mr. Ray Spear. Read the endorsement to the jury, will you please?

A. (Reading:) Number 193 N. S. F., 1908, first endorsement January 13th, 1908. Subject: Purchasing Pay Officer, Seattle, Washington. Relative to excess delivery of zinc plates under Naval Supply Requisition 195. Respectfully referred to the Board of Inspection, inviting attention to attached letter.

In view of the condition herein mentioned this office suggests [1147—1095] that the material referred to be reinspected in order that the excess delivery be rejected and returned to the contractor. Ray Spear, Paymaster, U. S. Navy, General Storekeeper.

Q. Mr. Spear was then recommending back through the Commandant's office that this excess delivery of 1,933 pounds be rejected and returned?

A. Because delivery had been previously accepted by the Board of Inspection, yes, sir.

Q. And he is recommending that be returned to the sender or to the consignor; is that right?

A. Recommended its rejection. Doesn't say

(Testimony of Edwin F. Meyer.)

anything about its return.

Q. Says "rejected and returned to the contractor"? A. Yes, sir, I see that.

Q. Then it went to the Inspector, didn't it?

A. Yes, sir.

Q. And I will call your attention to his recommendation in the matter. Read it to the jury.

A. (Reading:) It is recommended that a call be issued for reinspection of the material passed on Call number 1124 with the rejection and return to contractor of amount in excess of 4,000 pounds. C. H. Hayes, Lieutenant-Commander U. S. Navy.

Q. This Inspecting Officer then said to return this 1,933 pounds?

A. The Inspecting Officer did not have anything to do with the return. That was the Storekeeper's affair.

Q. The Storekeeper had recommended it and the Inspector said to return it?

A. I wrote this letter for the Storekeeper, having in mind the rejection of the material and the return.

Q. I see. But then you and Mr. Spear agreed this should be returned; [1148—1096] is that right?

A. Well, it seems so from here.

Q. And then the inspector says "returned," doesn't he?

A. Yes, sir. The inspector, however,—his function is inspection and not with the Storekeeper—

Q. Tell the jury why that letter never went back with this endorsement to the Commandant of the yard, where it belongs?

(Testimony of Edwin F. Meyer.)

A. For the reason we took action—after the Board recommended this, this letter was turned over to the Inspection Call Clerk in the office, who prepared a new Inspection Call in conformity with this third endorsement. He recommended that a Call be issued. The Inspection Call Clerk thereupon prepared a new Inspection Call, and the papers were left in the folder.

Mr. ALLEN.—I will ask another question.

Q. In naval procedure, when that had passed through the Commandant's Office and he makes a note to the effect this communication was received, shouldn't that have gone back, then, to the Commandant for his information so he would know what action had been taken in this matter?

A. No, not according to the conditions existing. Now, he merely—

Q. What do you mean by that—

Mr. MORRIS.—Let him finish.

Q. At that time. He keyed this to the Storekeeper. If he said "Return papers" it would be a different matter, but the key just shows it was routed via his office. He doesn't ask for a report on this.

Mr. ALLEN.—Doesn't that endorsement show it was started and referred back to the Commandant, Hayes; endorsement?

A. Well, it does show "Respectfully returned to the Commandant."

Q. It never reached the Commandant, did it?
[1149—1097]

A. Well, it did not apparently here. It may have.

(Testimony of Edwin F. Meyer.)

It is in the files of the Storekeeper.

Q. In other words, here the responsible officers do report and reject and order returned 1,933 pounds of Great Western zinc of the size 12 by 6 by 1½ inch, don't they?

A. The responsible officers here didn't have anything to do, as I stated, with the return of that zinc. That was a function of the Storekeeper's Office.

Q. They ordered that to be done, and Mr. Spear ordered it to be done?

A. Mr. Spear signed the paper here which I prepared.

Q. Now, tell the jury why didn't that 1,933 pounds of zinc go back to Goldberg's concern.

A. For the reason that it was on the navy yard; it was an article that was constantly being called for; we had had considerable trouble getting zincs for ships *proper* to that time, and 1,933 pounds, more or less, wouldn't make any difference; in fact, we wanted the zinc; therefore a requisition was issued in the Storekeeper's Office for that 1,933 pounds of zinc that was on the navy yard. It was a perfectly proper procedure under the circumstances.

Q. I see. After these officers and the Commandant had even inquired into it, and after these responsible officers had said this is rejected and is to be returned, you said we needed the zinc and left it stay there? A. No, sir, that isn't the idea at all.

Q. It did actually stay there, didn't it?

A. It did actually stay there.

Q. How do you know it did, as a matter of fact?

(Testimony of Edwin F. Meyer.)

A. Well, the records show that it did, and the fact a requisition [1150—1098] was submitted to cover it.

Q. Well, thereafter, then, with this 1,933 pounds of zinc lying down there, when was this matter next called to your attention that it was still there?

A. Some time previous to the preparation of that requisition.

Q. Who called the matter to your attention?

A. I don't recall now. It was a matter of routine of the office, the fact it was there and not taken away.

Q. As a matter of fact, wasn't it lodged in your rather retentive memory that 1,933 pounds of Goldberg's zinc was down there?

A. I said it never occurred to me.

Q. Mr. Goldberg didn't tell you that?

A. It never occurred to me that way. I had no information at that time it was there until I got it evidently from some one else. These are matters of routine.

Q. I understand. But, at any rate, these 1,933 pounds, or fifty per cent excess, that had been rejected, lay there until March, 1908, and then you started another requisition to take up the excess?

A. Not another requisition. I started a requisition to take up the excess.

Q. That is requisition 157? A. Yes, sir.

Q. And it makes the personal request Mr. Goldberg be allowed to bid?

A. Yes, sir. That calls attention to the fact this zinc was on the navy yard, was rejected from the

(Testimony of Edwin F. Meyer.)

Great Western Smelting & Refining Company, and—

Q. You seem to have a good bit of information—

Mr. MORRIS.—Let him finish his answer.

A. I get that from the face of the requisition.

[1151—1099]

Mr. ALLEN.—You had a good deal of interest in Mr. Goldberg?

A. No, sir, it was a matter of Government business.

Mr. ALLEN.—Have you any further answer you want to make?

A. (Answer repeated.) And it could be used at the navy yard and requested Washington to give these people an opportunity to bid, along with other people; not the stuff be bought from them without competition, but they be given an opportunity to bid, and if they were the low bidders and this material would be accepted. But Washington pays no attention to that recommendation, but directs the Purchasing Pay Office to buy it without competition.

Q. And that requisition referred to it, if I am not right—that requisition, then, was started by you on March 6th, 1908; is that right? A. Yes, sir.

Q. Calling your attention to Plaintiff's Exhibit Number "3," I will call your attention to this shipment of zinc, a full car of zinc which started back in December, and which was then on the way for delivery to your office, and reached there, or to your yard, and reached there on the 9th day of March, 1908. I will ask you whether or not you didn't have then in your office before you this bill of lading showing the shipment long prior thereto, and that there

(Testimony of Edwin F. Meyer.)

was then on the way to your yard a full car of zinc weighing 50,000 pounds?

A. This bill of lading shows the receipt in the General Storekeeper's Office, this receipt (showing), on the 29th of February.

Q. 29th of February? A. Yes, sir.

Q. Then on the 29th of February you had before you the bill of lading there was then shipped and en route a full car of [1152—1100] zinc of this identical size, weighing 50,000 pounds?

[Indorsed]: Proposed Bill of Exceptions on Behalf of Defendants, Edwin F. Meyer and Emar Goldberg. Vol. 7, pages 946 to 1100. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division. Mar. 14, 1914. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy. [1153]

A. This was in the files of the Storekeeper's Office.

Q. Passed right through your hands, didn't it, Mr. Meyer?

A. Well, it may have at that time; I don't know; it was available.

Q. It was available?

A. It was available, yes, sir.

Q. And that information went right through your hands in the regular procedure of the office?

A. There were thousands of such papers at that time.

Q. Look at the bill of lading. Thousands of such papers? A. Yes, sir.

Mr. ALLEN.—Very well. Calling your attention to the bill of the Illinois Zinc Company (handing

(Testimony of Edwin F. Meyer.)

paper to witness). Are those your figures?

A. 8,318, yes.

Q. So that passed through your hands, then?

A. That particular paper did, yes, sir.

Q. So you had that information before you, didn't you, Mr. Meyer?

A. Mr. Allen, you understand the routine in the office?

Q. Yes, I understand the routine in the office.

A. About that time there were thousands of these papers, and whenever one would come over the desk we would mark it filed and give it to a clerk whose duty it was to file it.

Q. How did you know, on March 8th, 1908, the United States Government needed 1,933 pounds of zinc?

A. The zinc was in constant demand. I knew that as I knew other things.

Q. Yes. How did you know that a little supply of that kind would be of any particular value to the United States Government? Did [1154—1101] you know the condition of the zinc in the storehouse at that time?

A. Why, the records would show here.

Q. I am asking you what you knew. Did you know the condition of zinc in the storehouse at that time?

A. I probably did.

Q. Now, did you or did you not?

A. Why, I must have investigated at the time.

Q. Will you say you did investigate it?

A. I won't say that I did or did not, but, in the

(Testimony of Edwin F. Meyer.)

ordinary course, I may have.

Q. Did you go to the warehouse card and look at that to see how much zinc was on hand on this occasion?

A. I may have. I doubt very much whether I would in the case of an excess delivery.

Q. You don't claim to know at this time whether you had on hand on March 9th any considerable amount of zinc or not? A. No, sir, I don't.

Q. And yet you are willing to start an excess delivery for Mr. Goldberg governing this 1,933 pound excess?

A. I did not start the excess for Mr. Goldberg.

Q. Excess requisition?

A. The excess was on the yard, and my experience with the Government has been it doesn't exact from the merchants in the country, want anything for nothing; that where it is reasonable the Government meets them halfway and is willing to do the right thing by them.

Q. Now, name one or two concerns in the city of Seattle, reputable concerns, for whom you made excess requisitions for excess deliveries of 50 per cent or better in the year 1908, for whom you prepared excess requisitions, except the Great Western [1155—1102] Smelting & Refining Company or W. A. Corder.

A. If I could carry in my mind these multitudinous things you are asking me I would be a wonderful man indeed. It is simply a physical impossibility.

(Testimony of Edwin F. Meyer.)

Q. But you will tell this jury at this time—

A. The records show this. I wouldn't have remembered it if the records had not been produced here.

Q. Do I understand you to say definitely and finally you can name one or can't, which is it?

A. At that particular period I don't think I can. And I do know that requisitions have been submitted at different times for excess material delivery by other contractors, even contractors as far back as the east.

Q. I conclude, Mr. Meyer, from this somewhat lengthy statement, that you can't at this time name one; is that right?

A. I just said that I could not.

Q. You could not. Very well, sir. Mr. Meyer, quite a bit was said by you in your direct examination with regard to this card, and some possible or probable error that might have occurred with reference to checking this zinc up. Would your judgment as to the quantity of zinc in the warehouse be as good as that of Mr. Lockwood, the man charged with the responsibility of keeping tab and check on the amount of the zinc there?

A. I don't understand what you mean. My judgment as to the quantity?

Q. Yes.

A. It wouldn't be a question of judgment; it would be a question of fact, actual weight of the stuff.

Q. Mr. Lockwood was charged with the responsibility of keeping check and tab on the weight of

(Testimony of Edwin F. Meyer.)

the zinc kept in his warehouse, wasn't [1156—1103] he? A. He was supposed to, yes, sir.

Q. He was supposed to, and he kept this card there to show at all times during the period covered by it the quantity of zinc then on hand; isn't that true?

A. Yes, sir.

Q. If there had been a 15,000-pound delivery to any ship, either at or before April 1st, 1908, Lockwood, of all men in the United States service at Bremerton, would be the man to know that fact?

A. I think he should know it.

Q. You think he should know it? A. Yes, sir.

Q. You were asked the other day with regard to some deliveries of August and July, and along the latter part of the year after April 1st, 1908. Could this requisition, of which you then knew nothing, have been a matter of information to you as regards April 1st, 1908?

A. No, sir, they were merely mentioned as requisitions on which was a call on the Storekeeper for same, not—

Q. Something was said about the "Buffalo," I believe it was, a requisition started in December, 1907, and that was actually the zinc delivered to the navy yard in January sometime, or latter part of December, and which you claim does not show on this card?

A. I don't claim it wasn't shown there, sir.

Q. Well, your counsel asked you whether it was shown there.

A. I probably stated it wasn't from the card.

Q. Mr. Meyer, if it were delivered on December

(Testimony of Edwin F. Meyer.)

25th or 6th or 7th or 8th, it wouldn't be shown on that card anyway, would it? [1157—1104]

A. Will you please let me see the card?

Q. The date of this card is from December 30th (showing).

A. This card was prepared on the 31st of December.

Q. If it was delivered before that it wouldn't show on that at all?

A. No, but the previous card would show it.

Q. Yes, but unfortunately we can't find it.

Mr. ALLEN.—Mr. Meyer, what was your compensation as Principal Clerk at the navy yard in Bremerton in the year 1908, April?

A. It was \$5.04 cents per diem.

Q. It was about \$125 a month, wasn't it?

A. Over that; about sixteen hundred a year, something like that.

Q. You stated the other day that you did not look at this card when you made your requisition for 50,000 pounds of zinc, but you are not sure whether you did look at the card or did not look at the card when you made a requisition for 1,933 pounds of zinc to take up the excess delivery of Mr. Goldberg's zinc?

A. I probably did not. I would not in that case, knowing so well that zinc was an article in constant demand and we had considerable difficulty in getting it proper to that time.

Q. And somebody friendly to Mr. Goldberg told you he had a ton of zinc lying down there?

A. No, sir; no one friendly to Mr. Goldberg said

(Testimony of Edwin F. Meyer.)

anything to me about it that I know of.

Q. How did it happen to strike your mind on this date, then?

A. Well, the various men around the navy yard are required to report to the office from time to time things that are in the navy yard that are not taken into stock.

Q. Did Mr. Lockwood report to you this 1,933 pounds? A. I can't say that he did.

Q. You can't say that he did and you can't say that he did not; is [1158—1105] that the idea?

A. No.

Q. At this time you haven't any other explanation of that? A. He may have reported that.

Q. At this time you haven't any other explanation for your interest in Mr. Goldberg's concern, except the one you have given?

A. Well, I had no interest in his concern, and as will be shown by the preparation of that requisition. The material was originally purchased from him at sixteen cents. In preparing the requisition I made the estimate only twelve cents, four cents less.

Q. And yet you can't tell the name of another merchant in Seattle during 1908 for whom you prepared—

A. I obtained this information from the records and not from memory.

Mr. ALLEN.—I don't want to tire this jury or the Court, and I don't want to tire myself and yourself, but I want you to place your finger on the particular part of that card which you contend is wrong.

(Testimony of Edwin F. Meyer.)

The COURT.—Showing the witness what?

Mr. ALLEN.—Plaintiff's Exhibit "8."

A. I don't know that any particular part of it is wrong. I asked for certain ships' requisitions covering a certain period, that being the original record. I made a compilation from the calls on the Storekeeper, and I found that there was a call for an aggregate of over 90,000 pounds of zinc during the period, approximately this period when this card shows an expenditure of about 50,000 pounds.

Q. Are you trying to tell the jury now it was your ordinary procedure that you would go and make a compilation of requisitions that were scattered through the files or would you go out [1159—1106] to the man who knew the amount of stock and take a look at the card?

A. Why, I am telling the gentlemen of the jury that I made this compilation for the purpose of presenting it to them. I have it here now, as shown by the records. I made no such compilation at that time; it wasn't necessary. I made this requisition anticipating these calls, and, as shown by the records which were brought into court, my anticipation was pretty nearly correct.

Q. Calling your attention to the St. Louis requisition, the same being stamped as Defendants' Exhibit "Y," which is the ship "St. Louis," I will ask you what is the amount of the requisition there.

A. 4,000 pounds.

Q. Does it show on this card, is it properly entered on this card?

(Testimony of Edwin F. Meyer.)

Mr. MORRIS.—I submit, may it please the Court, my memory is there were three requisitions on that card and it has already been compared and admitted in evidence in the presence of this jury.

Mr. ALLEN.—If you will concede this card is right we won't take the time. I want the jury to know it is right.

The WITNESS.—Take the compilation; that is right.

Mr. MORRIS.—We never questioned the truthfulness of the card.

The COURT.—What is the objection?

Mr. MORRIS.—I was suggesting, may it please the Court, that counsel seems to misunderstand the witness. We are not questioning the accuracy of that card so far as it goes as to the delivery, but we are questioning it as to the amount compared with the requisitions that came from the ships calling for material, and Mr. Allen is trying to confuse our position with his.

Mr. RIDDELL.—Do I understand, then, you admit that card accurately [1160—1107] shows the amount of delivery to the ships during the period covered by the card?

Mr. MORRIS.—I don't think there is any question about it.

Mr. ALLEN.—This requisition is right, then, is it, Mr. Meyer, that checks with the delivery on the card?

A. This requisition checks with the delivery on the card.

(Testimony of Edwin F. Meyer.)

Q. That disposes of one.

A. If you wish to go all over it in this lengthy manner, I have compiled there a statement that might expedite the matter.

Q. If you will point out on that particular card where you say it is wrong then we will get to that point.

A. Now, here is the method that I pursued. I haven't checked over this card, don't know whether it is or is not, but we have in evidence here certain requisitions started in the Storekeeper's Office calling for boiler zincs. I have tabulated those items on there and Mr. Shipley has a copy of it, and it shows a total of about 93,000 pounds of zinc that was called for during this period.

Q. That includes 15,000 delivered to a ship that was wanting 1,500?

A. I don't say delivered to the ship, I say a call of the ship for 1,500.

Q. Take Defendant's Exhibit "A-4." What is the amount called for on that requisition?

A. One thousand pounds.

Q. Was that in fact delivered or—what is that, the "Buffalo" or "St. Louis"? A. "St. Louis."

Q. Was that in fact delivered as called for?

A. There is an item here of August 23d, I think, which corresponds to that. [1161—1108]

Q. That corresponds to it. Calling your attention to Plaintiff's Exhibit "V," I think it is, I will ask you what that requisition calls for?

A. It is for the "Washington."

(Testimony of Edwin F. Meyer.)

Q. What is the date of it incidentally?

A. June 14.

Q. 1908? A. 1908.

Q. Made long after this 50,000 pound requisition of yours started?

A. Well, a great number of these were made after, quite a few of them.

Q. I notice that.

A. In fact, most of them.

Q. They couldn't have possibly, then, afforded you any information or light on April 1st, 1908, could they?

A. It wasn't necessary; I was doing that in anticipation of the receipt of these requisitions.

Q. You were guessing, then, as late as September?

A. It was not guessing, it was a question of duty I had to perform to the Navy Department in making this anticipation. If I failed to do it this trial would not be necessary, I would probably have been out of a job long before this. It is 2,000 pounds.

Q. Is that all right?

A. July 22d, 2,000 pounds, requisition 75. I guess that is all right.

Q. Calling your attention to Defendants' Exhibit "A-10."

Mr. SHIPLEY.—What ship, please?

A. "St. Louis" again.

Mr. ALLEN.—September 20, 1908.

Mr. SHIPLEY.—That is September? [1162—1109]

Mr. ALLEN.—Yes, sir, September 20th.

(Testimony of Edwin F. Meyer.)

A. 1,500 here—1,500 pounds.

Q. What ship is that? A. "St. Louis."

Q. That is correct, is it? A. Yes.

Q. Calling your attention to Defendants' Exhibit

"XX." A. That is the "Colorado."

Q. April 14, 1908? A. 6,000 pounds.

Q. Is that correctly shown on that card?

A. 6,000 pounds, yes, sir.

Q. That one is all right, then? A. Yes, sir.

Q. Calling your attention to Defendants' Exhibit

"A-1," which is the—

A. 3,000 pounds, "Kearsarge."

Mr. SHIPLEY.—That is item 3.

A. Item 3, yes. For some reason or other—that isn't correct. The "Kearsarge" wanted 3,000 pounds and there is only a charge of 2,000 pounds.

Q. What is the number of the requisition? As a matter of fact, then, according to that, they took a thousand pounds less than the requisition called for?

A. Well, I don't know that they took a thousand pounds. That is, the record here shows a thousand pounds less.

Mr. SHIPLEY.—What does that invoice on the requisition of the ship show?

A. Shows the item delivered, 3,000 pounds.

Mr. ALLEN.—3,000 zins. [1163—1110]

A. 3,000 pounds, please; there is the unit there.

Q. Now, you say there is a thousand pounds difference there. Defendants' Exhibit "9"—what is the date?

A. Date of March 9, 1908. This shows that the

(Testimony of Edwin F. Meyer.)

ship wanted 300 zinc plates.

Q. What is the total price, \$210?

A. Yes, sir. 300 zinc plates. I might say here that the price here has nothing to do with the issue of the material. The storeman who issues the material pays no attention to the price whatever. He is supposed to issue whatever is called for.

Q. I know, but if it was 15,000 of zinc, he wouldn't estimate it at two or three thousand dollars?

A. He wouldn't pay any attention to the estimated price; he would issue the material as called for.

Q. But if that said 1,500 pounds in here and he filled it out \$200, you would know that was not 15,000 pounds?

A. He would know there was an error some place and call the officer's attention to it.

Q. Is that right here (indicating)?

A. 300 plates were issued.

Mr. SHIPLEY.—Is that word "plates" on there or simply 300?

A. 300 plates, yes, sir, zinc. The "New Jersey," she got—

Mr. ALLEN.—Sometimes reads zinc and sometimes reads zinc plates.

A. Requisition 33. She got 29,070 pounds on this requisition for 300 plates.

Q. That checks all right?

A. I think that is about correct; yes, sir.

Q. I call your attention to Defendants' Exhibit—

A. "A-11."

Mr. SHIPLEY.—Mr. Allen, just let me suggest

(Testimony of Edwin F. Meyer.)

this. That was on the [1164—1111] “New Jersey,” also?

A. Yes, this is “New Jersey” also.

Mr. ALLEN.—Yes, “A-11.”

A. It is another instance where she called for 200 plates. That shows here as an expenditure of 2,080 pounds, over 2,000 pounds.

Q. You think that is about right?

A. I think that is about right.

Mr. SHIPLEY.—What is the language of the call?

A. Plates, zinc plates.

Mr. ALLEN.—Defendants’ Exhibit “A-8”?

A. Some of these requisitions have quite a number of items.

Mr. SHIPLEY.—If you will give me the name of the ship, I can give you the item.

Mr. ALLEN.—Ship “Tennessee,” cruiser.

Mr. SHIPLEY.—It is item 129.

A. This ship wanted 300 zines.

Mr. ALLEN.—How much did she get?

A. She got 2,000 pounds, according to the card.

Q. That is about right, then, isn’t it?

A. The other ship got 3,000; I guess that is about right.

Q. Calling your attention to Plaintiff’s Exhibit “A-5,” or Defendants’ Exhibit “A-5.”

Mr. SHIPLEY.—That is item 296.

Mr. ALLEN.—That is the “Charleston,” I believe.

A. This ship wanted 500 zines.

Q. What does the card show?

(Testimony of Edwin F. Meyer.)

A. That she was issued 4,800 pounds.

Q. That is approximately right? A. I think so.

Q. Calling your attention to Defendants' Exhibit "A-7." [1165—1112]

Mr. SHIPLEY.—That is item 19.

Mr. ALLEN.—That is the "Milwaukee." What is the date of that?

A. This ship wanted 1,000 zinc.

Q. This is October 1st, 1908. This is six months after, 1,000 zines. Couldn't have possibly had that in your head on April 1st, 1908?

A. There is no claim that I had that in my head.

The COURT.—A little louder.

A. I say, there is no claim here I had that in my head.

Mr. ALLEN.—See if that checks out, Mr. Meyer?

A. It shows the "Milwaukee" was issued 93,024 pounds.

Q. That is approximately right?

A. Approximately, yes.

Q. It might be 100 pounds one way or 100 the other? A. Yes.

Q. Calling your attention to Plaintiff's Exhibit "A-6," which is the "California."

Mr. SHIPLEY.—That is item 4.

A. 5,000 pounds of zinc.

Mr. ALLEN.—Check that on the card and see if that is right.

A. 5,000 pounds, yes, sir.

Q. That is correct. Calling your attention to De-

(Testimony of Edwin F. Meyer.)

Defendants' Exhibit "A-1," that is the ship "California."

Mr. SHIPLEY.—That is the 47th item.

A. Item 47, 8,000 pounds of zinc, "California."

Mr. ALLEN.—That check out all right?

A. That isn't on this card.

Q. What is the date of it, October or—

A. November 22d.

Q. It is after this card? [1166—1113]

A. Just a second. I will see when 47 was issued. That is issued December 19, date of delivery December 3d.

Mr. SHIPLEY.—Speak louder, Mr. Meyer.

A. That isn't on the card, 8,000 pounds.

Mr. ALLEN.—It is after this card, or issued prior to this card. It wouldn't show on this card, would it?

A. Well, it isn't shown on here.

Q. It would show on here, in the nature of things?

A. No, a previous card.

Q. So there is no error there, so far as you know?

A. I am not claiming an error; that isn't the point at all.

Q. What is this?

A. Defendants' Exhibit "A-3." This is a "Rhode Island" requisition.

Mr. SHIPLEY.—That is item 4.

A. She wants 2,000 zinc.

Mr. SHIPLEY.—What does the item call for? State what is in the item.

A. 2,000 zinc.

(Testimony of Edwin F. Meyer.)

Mr. ALLEN.—How does it check out?

A. "Rhode Island," 2,080 pounds.

Q. That is approximately right, then, isn't it?

A. Approximately correct.

Q. Calling your attention to Defendants' Exhibit "A-2," which reads, "Zincs, boiler, 2500." See if that checks out.

A. You have got the invoice there. You want the requisition there, do you, or the invoice?

Q. Well, look at the invoice and look at the requisition.

Mr. SHIPLEY.—There are two items there, "69" and "70."

A. This ship wanted item 69, 5,000 pounds, and item 70, 2,500 pounds.

Q. Check that out on the card. [1167—1114]

A. It is February 26th. The only entry I find here is 1,800 pounds to the "Pennsylvania."

Mr. ALLEN.—What is the date of it?

A. February 26th, 1908.

Mr. SHIPLEY.—How much?

A. She wanted a total of 7,500 pounds.

Mr. SHIPLEY.—How much did she get, as shown by the card?

A. About—she got 1,804 pounds.

Mr. SHIPLEY.—How much?

A. 1,804 pounds.

Mr. ALLEN.—What is the number of that, 28? What are those items? (Examining same.) Well, those are 5,000 pounds of one inch zincs. They wouldn't be shown on here, naturally?

(Testimony of Edwin F. Meyer.)

A. Shows boiler zinc.

Q. Well, this is half inch zinc, 2,500 pounds of half inch zinc.

A. I don't think they have any card for one inch. All boiler zincs are half inch.

Q. You mean to say that would show one inch as well as half inch zincs?

A. No, that would show $1\frac{1}{2}$ by 6 by 12 intended for all boilers.

Q. They make a requisition for 5,000 pounds of half inch zinc and 2,500 pounds of one inch zinc, and they got—

A. 7,500 pounds. That doesn't fill this order here. (Indicating.)

Q. Well, approximately?

Mr. ALLEN.—That is "A-13," "Kearsarge" (exhibiting paper to witness). That is what you contend misled you by reading 1,500?

A. No, I said nothing about misleading.

Q. Well, it says 1,500, that, then, is the one the jury has seen.

A. Yes, that is the one the jury has seen, and calling for 1,500 zinc. [1168—1115]

Q. You claim that meant 15,000 pounds?

A. I don't claim anything of the kind. The thing is clear on the face, 1,500 zincs.

Q. They can figure out what is clear on the face of it as well as you can?

A. Yes, sir. Very clear to me from my experience, they mean 1,500 zincs, not pounds.

Q. That means 15,000 pounds. Did you ever know

(Testimony of Edwin F. Meyer.)

of an instance where they served a ship with 15,000 pounds of boiler plate?

A. My experience with the Puget Sound Navy Yard—

Q. Answer the question.

Mr. SHIPLEY.—Let him answer.

A. Take a vessel like the “California,” for instance—will you let me see the exhibit of the “California”?

Mr. ALLEN.—You answer it first.

Mr. SHIPLEY.—He has a right to answer that.

Mr. ALLEN.—I asked him of an instance where 15,000 pounds were ever issued to any other ship.

Mr. SHIPLEY.—Get that exhibit for him.

Mr. ALLEN.—What exhibit do you want?

A. “California” requisition.

Mr. SHIPLEY.—That is exhibit “A-21.”

Mr. ALLEN.—Couldn’t he first answer the question.

The COURT.—He says he can’t do it until he sees the other.

A. No, sir, from memory I can’t say of any instance where I know. But, for your information, I would like to read from this requisition of the “California.”

Mr. ALLEN.—I am not asking you about that requisition of the “California,” I am asking you for a definite fact in which 15,000 pounds of zinc were issued to a ship. [1169—1116]

A. I can only testify to those things from record, not from memory.

(Testimony of Edwin F. Meyer.)

Q. If you don't remember, say so.

A. Well, I don't remember, but this explains that zinc proposition which I think the jury ought to know.

A. "The allowance of 2,000 pounds of zinc is not enough." This is by the Chief Engineer of the ship, to the authorities at Washington. "Each boiler uses 35 plates at each full renewal, which makes 560 plates, or 5,600 pounds for the ship. If the ship is kept actively at sea, there should be practically one renewal every quarter for each boiler under steam. I respectfully ask that the Commandant be asked to authorize the immediate issue of these supplies." That would be 5,600 pounds for a ship like the "California," per quarter.

Mr. SHIPLEY.—Now, as to the "Kearsarge"?

Mr. ALLEN.—Were you buying zinc for several years in the future?

A. No, sir, for about six months, and we estimated that each of these cruisers, each of these battleships, would have a six months' supply.

Q. If you were estimating for six months in the future, why was it necessary to have fifteen or five days' delivery?

A. Oh, well, the ships were going to take this supply to leave the navy yard with; they weren't going to be there for six months, they were going to cruise for six months.

Q. You knew the Pacific Fleet would be in and out of there during the year? A. Yes.

(Testimony of Edwin F. Meyer.)

Q. And they could take it up most any time.
[1170—1117]

EDWIN F. MEYER on the stand.

Cross-examination (Resumed).

(By Mr. ALLEN.)

Q. Mr. Meyer, we were talking before lunch in regard to this allowance of the "Kearsarge." Do you know what the allowance of the "Kearsarge" was, at or about this time, with reference to this particular item of boiler plates? A. No, sir.

Q. You do know, as a matter of fact, that whatever her allowance may have been, she couldn't exceed that particular allowance, isn't that true, whatever her requisition might be, she couldn't exceed the allowance allowed to her, under the rules and regulations allowed by the navy; isn't that true?

A. Oh, yes, sir, they do in a number of instances, they exceed, of that character of supplies.

Q. As a matter of fact, those regulations are laid down by the Navy Department, and the communication which you just read to the jury, was a representation made to the Navy Department, in which they asked for an allowance, in which another ship asked for an allowance in excess of the allowance fixed by the Navy Department?

A. Yes, sir, in all cases where it is in excess of allowance, it must be acted upon by Washington.

Q. The "Kearsarge," then, didn't have any application there for an excess of allowance, did they, in this particular requisition?

(Testimony of Edwin F. Meyer.)

A. Why, the requisition was approved by Washington.

Q. I am asking you whether or not the requisition has any record or history which would show that it was in excess or that they were asking in excess of allowance. [1171—1118]

A. This is not in excess of allowance.

Q. Not in excess of allowance?

A. Not in excess of allowance.

Q. If it were 15,000 pounds it would quite likely be in excess of allowance, wouldn't it?

A. I can't say it was quite likely, no, sir, I can't answer that. I don't know about her allowance.

Q. Don't you know that ships of that size and character, a battleship such as the "Kearsarge," that the allowance was probably 4,000 pounds, rather than fifteen thousand?

A. You are dealing with a probability there, sir; I don't know anything about that.

Q. You don't know anything about it?

A. I know it is a fact the ship asked for 1,500 plates. Her allowance may have been increased to fifteen hundred at some time. As to the probability, I don't know.

Q. You will state, then, you don't know what her allowance was, or what she could have been allowed in any event?

A. I asked for the allowance book of those ships; but Mr. House said they were not here, they were away.

Q. As a matter of fact, the big cruisers of the navy,

(Testimony of Edwin F. Meyer.)

took more zinc, because they have more boilers than the battleships; isn't that true?

A. If they have more boilers, they take more zinc; yes, sir.

Q. Well, isn't it true, you have been with the navy a good while, the big cruisers of the navy do have more boilers and require more zinc?

A. I don't know as to the number of boilers in any of the vessels.

Q. You don't know as to that?

A. No, sir, except information that would come in the way of a requisition, that is, on the "California." [1172—1119]

Q. But this \$15,000 item was not a matter in your memory upon which you acted, in preparing this requisition on April 1st, 1908, was it? A. No, sir.

Q. Didn't act upon that in any event?

A. Well, you say in any event.

Q. Well, did you consider that? Look at that.

A. Well, I didn't consider that in making the requisition. I didn't consider any requisition except those which had gone before, in anticipating the requirements.

Q. You did consider those which had gone before, did you? A. Yes, sir.

Q. You considered, then, this requisition which was made in December, and which had been purchased by the United States Government authorities at \$7.13 a hundred?

A. I am speaking now of the requisitions from the ship, the "Kentucky."

(Testimony of Edwin F. Meyer.)

Q. You didn't consider the requisitions which came from your own office, in which the Government had purchased zinc at \$7.13 a hundred?

A. That requisition was initiated in my office. I am—

Q. You still haven't answered the question.

A. You are jumping about, Mr. Allen. We were talking a moment ago, about the ships' requisitions, and then you injected a yard requisition into it. Well, it is confusing.

Q. Well, Mr. Meyer, I am not confined to the same routine in asking the questions your counsel were. I can jump about. I am asking you about 438.

A. I would like to have you make it clear to me, so I can answer it intelligently.

Q. I ask you now, when you prepared requisition 438, April 1st, [1173—1120] 1908, whether you did consider the former purchase by the United States Government authorities of an exactly similar amount, of 50,000 pounds, which had been purchased by them, and delivered to you within two weeks, and prior thereto, at \$7.13 a hundred, did you consider that?

A. I probably did at the time; yes, sir.

Q. You won't say you did or did not; is that right?

A. Well, the information is in the office. I probably did.

Q. You probably did? A. Yes, sir.

Q. You considered the Government had bought one car of zinc at \$7.13 a hundred, and it was all right for you to secure it at twelve and a half, which was

(Testimony of Edwin F. Meyer.)

an increase of fifty per cent?

A. I thought it was perfectly proper, at the time. It took the Government from three to four months to get that first car. The second car was wanted for the ship due there about May 15th.

Q. Refreshing your recollection, it took the Government from February 4th to March 9th. February 4th was the date of the award. It took them to March 9th, the date the zinc was delivered in Bremerton, to get that zinc.

A. That isn't the proper way to compute that.

Q. I am asking you if that is not a fact.

A. No, sir, the fact is the requisition left the Storekeeper's Office on the first of December, and it took them from the 3d of December to the date you mention there in February, to get bids on that zinc.

Q. I am asking you whether it isn't a fact the United States Government purchased from a concern in Baltimore, and which was actually delivered from a place in Illinois, a car of zinc, which was awarded on February 4, 1908, and the zinc actually delivered in Bremerton on March 9th of the same year?

A. If the records show it, I think that is correct.
[1174—1121]

Q. Well, you have looked at the record several times. Isn't that a fact?

A. Yes, sir, I think the record shows that. That also is misleading, Mr. Allen.

Q. Well, that is a matter for your counsel.

A. No, sir, I think I am entitled to say something about that.

(Testimony of Edwin F. Meyer.)

Q. Well, you have said something. You want to say anything else?

A. Yes. The requisition I want to say, was prepared in the Storekeeper's Office on the 3d of December, and it took from the 3d of December, until in March, to get the delivery.

Q. And there wasn't anything to prevent the United States authorities from telegraphing to the firm in Baltimore, whether or not they could duplicate that order and send a second car at \$7.13, was there?

A. Absolutely nothing, sir. Washington exercises that right at all times.

Q. When requisition 438 left your hands, requisition 438 is the requisition for 5,000 pounds of zinc started April 1st, 1908, when it left your hands, or your desk, and went to Mr. Spear's desk, did it have attached to it any white flag or red flag, or any other mark which would call this particular transaction to his attention?

A. As I recall, it had written on the face of it in red ink, the statement which we have read here from time to time.

Q. As you recall it, it had written on it this statement, "Requested for the ships of the Atlantic Battleship Squadron," which you have identified as your handwriting.

A. Yes, sir, which would serve a better purpose than any slip I might have attached there.

Q. Mr. Meyer, that would have had the same thing written on it if it [1175—1122] had been a requi-

(Testimony of Edwin F. Meyer.)

sition for 625 as if it had been a requisition for \$6,250? A. Identically, sir.

Q. So you did not think it was necessary to call Mr. Spear's attention to the difference between a \$500 requisition and a \$6,000 one, by a special mark, or anything of that sort?

A. No, I hardly think so. The quantity was the thing we were concerned in.

Q. Yet you can't recall now, as you have stated, any other item similar in size for stock which was prepared by you during these months, can you?

A. Well, there were quite a number—oh, thousands of articles being requisitioned for. If I had an opportunity to go over the records there, I might find some.

Q. You have all the opportunity in the world.

A. No, sir, I haven't. Those records—I have been separated from them for five years; I haven't been over to the navy yard; I have only asked for such papers that occurred to me.

Q. If Mr. House, who is a thoroughly capable accountant, has made a search to ascertain whether there were any, and finds none in these two or three months, would you say his judgment was right in the matter?

A. Mr. House is biased; he may not have examined them as thoroughly as he might.

Q. You do not recall any now?

A. From memory, no, sir. I recall one requisition that was sent through about May. In looking over papers here the other day, I saw one which would

(Testimony of Edwin F. Meyer.)

aggregate probably something like \$10,000, but that particular requisition was prepared in another yard department.

Q. It was not for stock in your storehouse?
[1176—1123]

A. Well, it was for stock for the battleships.

Q. It was not stock for your warehouse, was it?

A. Well, all the stores are supposed to be warehouse stores, as far as that was concerned.

Q. What is this requisition you are talking about?

A. Some requisition there, a lot of material; I don't know what it was. I saw it was for something, one item on it several thousand dollars.

Q. But you don't know whether that was flour, or something of that sort?

A. No, sir, that was for metals of some kind.

Q. Well, what kind was it? Let us try to find out.

A. I don't recall now.

Q. You can't recall that? Here is the book that you asked for. A. I didn't ask for it, sir.

Q. State to the jury whether the "West Virginia" is approximately the same kind and character of boat as the "Kearsarge."

A. The "West Virginia" is a cruiser, a large cruiser, and the "Kearsarge" is a battleship. I think she is one of the large battleships, if I am not mistaken. I don't know as to her size; I imagine they are about the same, though.

Q. Calling your attention to page 133 of this publication from the Government printing office in 1904, I call your attention to the allowance of zinc for boil-

(Testimony of Edwin F. Meyer.)

ers, best, rolled plate, subject, under the head of allowance, two thousand (2,000) pounds. Allowance for the first half, 2,000 pounds allowance for the second half, 2,000 pounds. Would you consider, with that fact before you, it is possible the "Kearsarge" would want 15,000 pounds under one requisition?

A. Why, when the ships ask for one thousand plates, I imagine it would be possible. [1177—1124]

Q. Yes, sir, you imagine it is possible.

A. Yes, when an engineer officer says his ship would require 560 plates every three months, there is 1120 plates in six months.

Mr. ALLEN.—That is all right. That is all.

On redirect examination by Mr. SHIPLEY said witness testified as follows:

Q. What date do you refer to in this book, please, Mr. Meyer, calling your attention to this page 131 of the allowance book for the "West Virginia," I will ask you whether there is anything to be shown, or whether you have any knowledge as to whether that allowance was in force and effect between the first day of November, 1907, and the first day of October, 1908?

A. I have no information as to that at all.

Q. Does that book show it to have been in force during that period, on that page, anything in connection with that allowance that shows it?

A. No, sir. Just a second. It may be I can throw a little light on this matter by taking a minute here. It shows a number of amendments, but, without going into it in detail, I would say I have no knowledge,

(Testimony of Edwin F. Meyer.)

no, sir. These allowances are amended from time to time. I can't say that has not been.

Q. Mr. Meyer, if a ship is in need of such an article as zinc, regardless of whether the quantity she requires is in excess of the amount contained in one of these books, these printed books, is there a method by which she can procure that allowance to meet her needs, her actual requirements, whether it is in excess of this allowance or not?

A. Yes, sir, if she prepares requisitions for whatever she wants. It is just a little—

Q. By whom are those requisitions prepared?

A. By the engineer of the ship, the Chief Engineer.
[1178—1125]

Q. In the case of the "California," to which counsel directed you on cross-examination, by whom was the certificate or communication signed, calling attention to the fact that the requirements of that particular ship were 5,600 odd pounds quarterly?

A. By the engineer, and I think by the captain, the records show.

Q. Are those men who would have expert knowledge as to the requirements of that particular ship?

A. They are the only people who have that knowledge, I think, sir, on the ship.

Q. If a ship requisition comes into the Storekeeper's Office, demanding or calling for certain articles, and it does not appear on the face of the requisition to be in excess of allowance, is there any discretion in the Storekeeper to pass upon whether it is needed or necessary, or not? A. No, sir, I don't—

(Testimony of Edwin F. Meyer.)

Q. If a ship's requisition comes in signed by the proper officer of the ship, calling for a certain quantity of any article, and it appears upon the face of the requisition that it is in excess of the allowance, meaning the allowance that is given in her own appropriate allowance book, what is the procedure then?

A. The regulations provide that that paper be forwarded to the Navy Department at Washington, D. C., for approval. Then it is returned to the Storekeeper's Office, and, if approved, the articles called for are issued from stock or procured for the vessel. In any event, the vessel got the articles either from stock or by purchase for the vessel.

Q. Now, at the time that you were preparing these requisitions, anticipating requirement both of the Pacific Fleet and of the battleship fleet, commencing with the original purchase of 50,000 pounds and the second purchase of 50,000 pounds, under requisition 438, did you have personal knowledge as to the number of boilers with which each ship of the navy was equipped? [1179—1126]

A. Well, some of the requisitions that were received and that came under our supervision, that is, this statement—

Q. The question is, whether or not at that time you had in your mind, personal knowledge as to the number of boilers and the requirements per boiler, and requirement per ship, so that you had definite knowledge of those particular matters at that time.

A. Well, yes, sir; I knew that ships were requir-

(Testimony of Edwin F. Meyer.)

ing as much as 5,000 pounds a quarter.

Q. I guess my question is too long. The question is this, whether at that time the preparation of these requisitions, anticipating the necessity of stock, whether you were personally familiar as a matter of detail, with the number of separate boilers, or of boilers in each individual ship, or whether you approximated it.

A. Well, I would approximate it. I didn't know as to the number of boilers in each of the various ships, but my guide would be the demand, the previous demands of ships.

Q. Was the ship "California" one of the large cruisers which was referred to by Paymaster Spear as one of the "Big Four," do you recall?

A. I think she—I don't think she is one of the "Big Four"; I think she is approximately the same size of the "Big Four," perhaps just a trifle smaller. To the best of my recollection, the "Big Four" was the "Colorado," "Pennsylvania," "Maryland" and "West Virginia."

Q. Now, this allowance book pertains to the "West Virginia." The certificate of the Chief Engineer of the cruiser "California" was to the effect that the requirements of that ship were 5,600 pounds of zinc every three months. Which did you have in your mind when you prepared these requisitions, the ships' requisition of the "California," which is in your possession, or this book, which counsel exhibited to you?
[1180—1127]

A. I would like to explain that, Mr. Shipley. The

(Testimony of Edwin F. Meyer.)

allowance of certain articles of the ship, like oil, and cotton waste and zinc, included, I have understood, as required, that is, that the ships are not restricted absolutely to their allowance, but that it makes some difference whether the ship is cruising or not. If she is in the harbor, she doesn't use as much of certain things as she would use if she were cruising. Now, the allowance in that case would be variable. You would have one six months, maybe, ten or fifteen thousand pounds, another six months probably only two or three thousand pounds; therefore, in estimating the probable demands of a ship going on a long cruise that way, you would estimate the largest amount required in any given period, and that amount would be used for a period of six months.

Q. Now, in anticipating to meet the requirements of the Atlantic Fleet and the cruisers which were to accompany the Atlantic Fleet on a cruise around the world, were you anticipating a need for a long continuous period of time, or to be tied up where she wouldn't need them naturally?

A. Well, I expected that the ships would take a full six months' supply, because she would not strike another American port for some considerable time after leaving this port, and I expected that all of the ships would take a full six months' supply to suffice until they got on the other coast.

Q. And, in fixing in your mind the necessities of ships for zinc, did you at that time have in your mind the requirements of the ship "California," as expressed officially by her expert officials on that par-

(Testimony of Edwin F. Meyer.)

ticular subject? A. Yes, sir.

Q. And in arriving at a conclusion as to the requirements of the total number of ships, how did you approximate it? [1181—1128]

A. Well, roughly, we multiplied by ten, that was the procedure generally, although there were only eight ships, but a little excess we ought to keep on hand all the time.

Q. After having made this approximation in anticipation of the requirements for zinc, that requisition was forwarded to the officials at Washington, was it not, for their approval? A. Yes, sir.

Q. And came back approved? A. Yes, sir.

Q. That is, the purchase?

A. Yes, sir, authorized by the Secretary of the Navy.

Q. Counsel asked you this question just a few moments ago, if there was anything to prevent the officials at Washington, when this second requisition came in, from telegraphing to the people or factory who had furnished the first carload of zinc, to ascertain at what price they could make the delivery on this second purchase on requisition 438. I will ask you this question: If, before the approval of this purchase of 50,000 pounds locally, under requisition 438, the Bureau of Supplies and Accounts, the Secretary of the Navy and other appropriate heads of the Navy Department in Washington, did not have in their possession and before them all of the matters that pertained to the purchase of the first carload of zinc, under the requisition, I believe, 490?

(Testimony of Edwin F. Meyer.)

A. Yes, sir, that purchase was made by the Paymaster General at Washington, D. C.

Q. If the Paymaster General in Washington, D. C., had desired to have purchased this second carload that was called for under requisition 438 generally or directly from the factory, could he not have rejected this proposed purchase, under requisition 438, locally? [1182—1129]

A. Why, he was the man who authorized the purchase; yes.

Q. Well, I say, he could have rejected it, then?

A. Yes, the purchase wasn't authorized until he approved that.

Q. The fact you had initiated it to be purchased locally did not prevent the superior officer in Washington from turning down that requisition and refusing to have the purchase made locally, did it?

A. Oh, indeed not, sir; that is his function.

Q. I say, at the time of approving it, if they had elected to have rejected it, and bought directly from the factory in the east, they had the privilege of doing it, did they not?

A. Oh, yes, sir, that was their exclusive prerogative.

Q. And instead of doing that, they directed purchase through the Purchasing Pay Office in Seattle, did they not? A. Yes, sir.

Q. Of 50,000 pounds, under an estimated price of 12½ cents or \$12.45? A. Yes, sir.

Q. Was that action binding on you?

A. No, sir, I had nothing to do with that.

(Testimony of Edwin F. Meyer.)

Q. Well, I say, was it binding, so far as you were concerned? A. Absolutely binding, yes, sir.

Q. You had no authority to refuse any action on the part of the authorities at Washington, had you?

A. Indeed not, sir.

Mr. SCHLESINGER.—May I have Mr. Meyer withdrawn for a moment, and put a bank official upon the stand?

The COURT.—Yes.

(Witness withdrawn temporarily.) [1183—1130]

[Testimony of R. M. Walker, for Defendants
(Recalled).]

R. M. WALKER, recalled as a witness on behalf of the defendants, further testified as follows:

Direct Examination.

(By Mr. SCHLESINGER.)

Q. Mr. Walker, I believed you testified the other day that you were an official of the National Bank of Commerce in this city. A. Yes, sir.

Q. And you know Mr. Emar Goldberg?

A. Yes, sir.

Q. And he had an account at that bank, did he not?

A. Yes, sir, he did.

Q. I will ask you, Mr. Walker, whether I asked you this morning to bring with you a statement of Mr. Goldberg's account for two certain dates.

A. Yes, sir, you did.

Q. And have you brought with you those statements taken from the bank books? A. Yes, sir.

Q. I will show you what purports to be a statement of Mr. Emar Goldberg, an account with the National

(Testimony of R. M. Walker.)

Bank of Commerce, from May 25th, 1908, to June 3d, 1908. I will ask you whether or not that statement is taken from your books.

A. Yes, sir, it was.

Q. And were those entries made in the usual course of your banking business? A. Yes, sir.

Mr. SCHLESINGER.—We will offer this in evidence, Mr. Allen.

Mr. ALLEN.—May I ask him a question?

Mr. SCHLESINGER.—Yes.

Mr. ALLEN.—Is this the original account or is this simply a [1184—1131] prepared memorandum?

A. That is just a copy of the entries on the ledger.

Mr. ALLEN.—Have you compared it, Mr. Walker, personally?

A. Yes, sir, I took it off myself.

Mr. ALLEN.—So you know it is a bank copy?

A. Yes, sir.

Mr. ALLEN.—I have no objection. That is Mr. Goldberg's personal account?

A. Yes, sir.

(Paper referred to received in evidence and marked Defendants' Exhibit "A-105.")

Mr. SCHLESINGER.—I will also show you what purports to be another statement of Mr. Emar Goldberg from April 27th, 1908, to April 28th, 1908 (handing same to witness).

A. Yes, sir, that is a copy.

Q. And that likewise is an accurate copy taken from your bank books, Mr. Walker? A. Yes, sir.

(Testimony of R. M. Walker.)

Mr. ALLEN.—What is that, Mr. Schlesinger, please?

Mr. SCHLESINGER.—That is simply one day showing the total amount of deposits.

Mr. ALLEN.—I don't understand this now. This is Emar Goldberg's account of what date?

Mr. SCHLESINGER.—That is between four or five different dates from May 25th to June 3d, 1908.

Mr. ALLEN.—I understand Mr. Walker this includes the items as they appear there from day to day during the periods at the top and the bottom; is that right?

A. Yes, sir.

Mr. ALLEN.—None omitted, or anything of that sort, they are all [1185—1132] on there?

A. Oh, yes; they are all on there.

Mr. SCHLESINGER.—I will also show you what purports to be a deposit slip bearing date 5/27/08, and ask you whether that is an original deposit slip with that bank by Mr. Emar Goldberg.

A. Yes, sir, it is.

Mr. ALLEN.—What relation is there to that and this (showing)?

Mr. SCHLESINGER.—To June 3d, 1908. That one (showing) is for one date.

Mr. ALLEN.—I object, your Honor, in that form. I submit this man should bring his ledger here and pick out the items.

Mr. SCHLESINGER.—Do you want his ledger from the very date of his birth down to the present time?

(Testimony of R. M. Walker.)

The COURT.—If this contains the items in the bonus account that went to Goldberg's personal credit that is all we are concerned about here, I think.

Mr. SCHLESINGER.—Yes, sir.

Mr. ALLEN.—Does it contain all of the items? Now, that is the question.

The COURT.—It contains all of the items going to defendant Goldberg, not items that go elsewhere?

Mr. SCHLESINGER.—That is the point exactly.

Q. I will now show you—is that the deposit slip (handing paper to witness)? A. Yes, sir.

Mr. SCHLESINGER.—We will offer this in evidence likewise.

The CLERK.—“A-107” is this deposit slip of 5/27/08?

(Paper referred to received in evidence and marked Defendants' Exhibit “A-107.”) [1186—1133]

Mr. SCHLESINGER.—I will now show you a deposit slip marked 5/18/08, and ask you whether that is a true copy of the original.

A. Yes, sir, it is.

Q. You had the original the other day, Mr. Allen. You might let this go in place of that original. We will offer this in evidence.

(Paper referred to received in evidence and marked Defendants' Exhibit “A-108.”)

Mr. ALLEN.—That is a true copy?

Mr. SCHLESINGER.—Yes, sir.

Q. And I will show you a final deposit slip marked

(Testimony of R. M. Walker.)

5/18/08 with Emar Goldberg, and showing deposits in the sum of \$586. Is that an original deposit slip?

A. Yes, sir.

Q. Stating the deposits of Mr. Goldberg on that date? A. Yes, sir.

Mr. SCHLESINGER.—We will ask to have this marked also, if your Honor please.

(Paper referred to received in evidence and marked Defendants' Exhibit "A-109.")

Mr. ALLEN.—Is that the original or a copy?

Mr. SCHLESINGER.—Yes, that is the original. Now, will you consent, Mr. Allen, these originals may be withdrawn and copies substituted therefor?

Mr. ALLEN.—Yes, sir. I am going to ask Mr. Walker to bring down here a statement of this account from the first day down to and including all of these days down to the last item mentioned here.

A. Yes, sir. [1187—1134]

Mr. SCHLESINGER.—I will give that back to you, Mr. Walker, because I have the certified copy. It is number "A-108."

Mr. RIDDELL.—That is the copy you are leaving in?

The COURT.—"A-109" withdrawn?

Mr. SCHLESINGER.—Yes. I have the certified copy instead of the original.

Mr. ALLEN.—You will bring the other statement, will you, Mr. Walker?

A. Yes, sir.

Mr. ALLEN.—That word "us" means check drawn on your own bank, doesn't it?

(Testimony of R. M. Walker.)

A. I think it does, Mr. Allen. Mr. Goldberg put those notations on there, but I would take it to be that.

Mr. ALLEN.—You didn't see him do that?

A. No, I didn't.

The WITNESS.—Isn't there one original ticket I didn't get back?

Mr. SCHLESINGER.—If there is we will try to find it for you.

The WITNESS.—You had it just a minute ago.

Mr. SCHLESINGER.—Mr. Silverstone, take the stand out of order.

**[Testimony of E. Silverstone, for Defendants
(Recalled).]**

E. SILVERSTONE, recalled as a witness on behalf of the defendants, further testified as follows:

Direct Examination.

(By Mr. SCHLESINGER.)

Q. Mr. Silverstone, you testified the other day, when called as a witness for the Government, that in the year 1908 you were the proprietor of the Herald Hotel in the city of Seattle?

A. I testified I was interested.

Q. Interested? [1188—1135] A. Yes, sir.

Q. You are still conducting that hotel, Mr. Silverstone? A. I am still interested in it.

Q. Do you know Mr. A. Alper, Mr. Silverstone?

A. I do.

Q. And how long, please, have you known him?

A. About fifteen or sixteen years.

Q. Did you know him in the city of San Fran-

(Testimony of E. Silverstone.)

cisco? A. I did.

Q. What was your business in San Francisco?

A. I was contracting freight agent for the Southern Pacific Company.

Q. Contracting freight agent for the Southern Pacific Company. Did you, in your capacity, come in frequent contact with Mr. Alper? A. I did.

Q. In the way of soliciting freight from him?

A. Soliciting freight, yes, sir.

Q. I will ask you, Mr. Silverstone, whether, in the month of April, 1908, you saw Mr. Alper in the city of Seattle? A. I did.

Q. Are you able to give to this jury approximately the date when you saw him?

A. From my cash-book there I can say that he paid his bill in the hotel on April 4th.

Q. Of what year?

A. I believe that is the date, 1908.

Q. Does that cash-book show the amount of the payment on that bill? A. It does.

Q. And how long would you say that he had been at that hotel prior to April 4th, 1908? [1189—1136]

A. About four days.

Q. About four days. Will you please, Mr. Silverstone, by reference to this book, indicate to these men the dates upon which Mr. Alper stayed at your hotel?

A. Well, I should say either from March 31st or April 1st to April 4th. Mr. Alper and Mr. Bloom and Mr. Rightler, all connected with the Great Western Smelting & Refining Company, were there, Mr.

(Testimony of E. Silverstone.)

Alper and Mr. Bloom with their wives, and Mr. Rightler alone.

Q. Will you kindly read that entry?

A. April 4th received from Mr. Alper \$34.50.
For—

Q. Just the one entry is sufficient. Now, was that a payment for previous board and lodging immediately due by Mr. Alper?

A. From the time he arrived until the time he left, yes, sir.

Q. And do you, from that item, approximate that Mr. Alper arrived at your hotel on or about the 28th day of March, 1908?

A. Well, I wouldn't say that, but around the latter part, about—I should judge from this about the 31st.

Q. And that was in settlement of his bill, was it?

A. It was, yes, sir.

Mr. SCHLESINGER.—You may cross-examine. We will offer, your Honor, please, this item in evidence.

The COURT.—I believe it is already read to the jury.

On cross-examination by Mr. ALLEN said witness testified as follows:

Q. There really is a Mr. Alper living in San Francisco?

Mr. ALLEN.—Mr. Silverstone, he left this city, according to that—did he tell you good-bye, say he was expecting to leave the city—

A. Well, I didn't see him when he left. I met him while he was there.

(Testimony of E. Silverstone.)

Q. You didn't see him in the city after that?
[1190—1137] A. No, sir.

Q. He left here about the 4th of April?

A. Yes, sir.

Q. He was here about four days, then?

A. About four days, I would judge, from that.

Mr. SCHLESINGER.—May he withdraw that book?

Mr. ALLEN.—Yes. You would prefer to keep that book?

A. Yes. [1191—1138]

[Testimony of Edwin F. Meyer (Recalled—Re-direct Examination).]

EDWIN F. MEYER, recalled for continued re-direct examination, testified:

(By Mr. SHIPLEY.)

Q. Mr. Meyer, on Saturday, the United States Attorney asked you whether or not Meyer had always been your name, and whether or not you had at one time gone under the name of Fassimeyer. I will ask you to state to the jury what your full name is.

A. Edwin F. Meyer.

Q. What does that "F." stand for?

A. Well, that requires a little explanation. My father was known to his friends as Facemuier. He was familiarly called Facemuier.

Q. Meyer was the surname and "Face" was the given name?

A. No, William Facemuier, but people made it a sort of hyphenated name, and they always referred to me, the people who knew him, as Facemuier's boy,

(Testimony of Edwin F. Meyer.)

or something of that kind, but I have never been known by any other name than Meyer.

Q. Meyer was your father's surname and your surname? A. Yes, sir.

Q. Family name. And you have borne that name since your infancy? A. Since infancy.

Q. And your middle name stands for your father's name? A. "F.," yes, sir.

Q. Did you ever sail under the name of Fassmeyer? A. Absolutely no, sir.

Q. Intimated by counsel? A. Always Meyer.

Q. Mr. Meyer, you were asked under cross-examination with reference to whether or not it was not the invariable custom for the different departments of the yard requiring material, before they prepared a department requisition, to call on you for [1192—1139] information relative to the price at which the stock desired could be secured at in the market. I will ask you whether or not there are any exhibits which have been introduced in this case, any letters or documents such as you referred to in answer to counsel's question, showing that the requisition office of the particular department communicated directly with merchants and dealers, instead of applying to you for information?

A. They very frequently applied to contractors. And Mr. Goldberg has introduced here communications showing that the officers in the respective yard departments did, in fact, communicate with him asking—

Q. I will call your attention to a letter which has

(Testimony of Edwin F. Meyer.)

been introduced as one of the exhibits by Mr. Goldberg, I haven't the number of it, written by the naval constructor, or one of the naval constructors, I believe Mr. Walsh. What was his position?

A. Mr. Walsh was assistant naval constructor, and it was my understanding he was in charge of the material end of the Construction and Repair Department of the Puget Sound Navy Yard; in other words, the requisition office as well.

Q. And the letter shown in evidence in this case, directed to Mr. Goldberg, inquiring at what price certain supplies could be obtained from the Western Smelting & Refining Company, was that in aid of the preparation of a requisition in that particular department?

A. For that particular department, yes, sir.

Q. And not through you? A. No, sir.

Q. I will ask you the same question with reference to another letter introduced, which I believe, came from the requisition officer or clerk of the Engineering Department, directed to the [1193—1140] Western Smelting & Refining Company of this city. Was that the same character of a transaction?

A. The same is true of the Engineering Department, yes, sir, of which the letter, I think, was written by Mr. Drake, who, I think, at that time was connected with that department.

Q. Now, is it not true that there was some department of manufacturing, or something of that kind, over there that had an extensive requisition department?

(Testimony of Edwin F. Meyer.)

A. Well, prior to the consolidation of those respective yard departments there were five, and the Construction and Repair Department had a very extensive requisition office. Their requisition office was more complete, in fact, as far as details were concerned, than the office in the General Storekeeping Department.

Q. Now, that continued up until what year?

A. Well, various departments were consolidated, I believe, sometime in 1909 or 1910.

Q. In order to refresh your memory, did that not occur after the visit of Secretary Meyer to the Puget Sound Navy Yard, after the administration of Paymaster Brown?

A. The departments were consolidated before that time, but these requisition offices were not abolished until after Secretary Meyer had come here and decided the Storekeeper's Office was the proper office in which these requisitions should be prepared, and he abolished all of these other offices, particularly that in the manufacturing department, which, I think, was the only one—the others had been previously consolidated with the manufacturing office, but he abolished that and transferred two of the clerks to the Storekeeper's Office.

Q. And that was the time you were made Requisition Clerk? [1194—1141]

A. No, I was made Requisition Clerk before.

Q. Well, I mean your duties were almost entirely confined from that time on?

A. They had been prior to that time also, Mr.

(Testimony of Edwin F. Meyer.)

Shipley, but it was increased that time. I had then the responsibility of the requisitions which had previously emanated in the other offices.

Q. That was long after the period of the spring of 1908?

A. It was, indeed; December 1st, 1910, was that transaction.

Mr. SHIPLEY.—I believe that is all I care to re-direct on.

(By Mr. KERR.)

Q. I would like to ask the witness one or two questions.

The COURT.—Proceed.

Q. For the purpose of testing your knowledge about the possibility of the coming to this coast, counsel called your attention to the issue of "The Seattle Times" of July 2d, 1907. You recognize this? A. Yes, sir.

Q. You were called down and asked to examine it. You were asked whether you might not have read the contents of this particular issue. You didn't remember whether you had or not?

A. No, sir, I couldn't remember whether I did that or not.

Q. Well, do you remember that about July, 1907, it was an open question here, for several reasons, whether the Seattle "Daily Times" was going to declare war on Japan or not, was there not?

A. I remember there was some talk about it.

Q. Let me call your attention to these matters that counsel brought in here for some purpose, and

(Testimony of Edwin F. Meyer.)

this is what these headlines are: (Reading from headlines of newspaper.) And then I want to ask you whether this would in any way tend to call your attention [1195—1142] to the fact that the Atlantic Squadron might arrive here at some old time for the purpose of cruising around the world. That was July 2d. (Again reading from newspaper.) That was on July 2d, 1907. Had you read this article to which counsel called your attention, as a clerk in the store over at Bremerton, would it give you any notice, on a mere reading of that kind of a newspaper statement, to begin to assemble stuff for this fleet?

A. Absolutely have no effect whatever, sir.

Q. I want to call your attention to Defendants' Exhibit "A-80" and ask you— this has reference to requisition for sheet tin. I want to ask you whether that article used in the navy yard was as commonly and generally used as zinc plate? A. Sheet tin?

Q. Yes?

A. Yes, sir, it was; not in as large quantity.

Q. But was used there?

A. But used in smaller quantities, but as generally, I think.

Q. This requisition seems to bear date July 10, 1908, that I call your attention to, Defendants' Exhibit "80"? A. Yes, sir, July 10, 1908.

Q. Look at that folder and state to the jury what requisition that is.

A. Requisition 84, Naval Supply Fund, July 10, 1908.

(Testimony of Edwin F. Meyer.)

Q. That has been identified as Defendants' Exhibit "80." You find three bids there, don't you, for that tin? A. Yes, sir.

Q. Just read those three bids.

The COURT.—Oh, I think I will let it go in.

Mr. ALLEN.—Wouldn't your Honor at least limit this in that direction? [1196—1143]

The COURT.—How much further is this going?

Mr. KERR.—One or two others. And one other the plaintiff put in themselves, Plaintiff's Exhibit "75." I want to read this to the jury.

The COURT.—The one you were talking about was "80"?

Mr. KERR.—Yes, the one is A-80 that I was just talking about.

The COURT.—That is July 10, 1908.

Mr. KERR.—I now want to call the jurors' attention to Government's Exhibit No. 75. This requisition "75" called for two items, one of lifts, bulkhead lifts, and the other of zinc plate. I want to call the jury's attention to the bids upon the item for flathead lifts.

The COURT.—You can read it. It is in evidence.

Mr. KERR.—This is in evidence.

The COURT.—Yes. I don't know whether it has been read or not. You can read it.

Mr. ALLEN.—I don't know what you are talking about, Mr. Kerr.

Mr. KERR.—You put it in, you ought to know. The bid of the Knox Brothers, 96 Illinois Street, New York, item No. 1, Class No. 1, lifts, \$36.14.

Mr. ALLEN.—That is one item?

Mr. KERR.—Yes, per pound, 13.9 per pound. The only other bid is a bid of Richard A. Gray, same item, thirty cents per pound.

Mr. ALLEN.—He is down in California?

Mr. KERR.—I don't know where he is, but that is the two bids you had on that.

Mr. ALLEN.—Look and see.

Mr. KERR.—I desire in this matter to offer in evidence Defendants' Exhibit "A-58," requisition under date of August 5, 1907.

Mr. ALLEN.—That is for the same purpose, Mr. Kerr? [1197—1144]

Mr. KERR.—Yes, the same purpose. Shows this was awarded to W. A. Corder upon a bid of \$240.00.

The COURT.—Read that part you desire in.

Mr. KERR.—The bid of Port Lumber Company, Inc., for this, \$41.00.

Mr. KERR.—That is all.

(Folder referred to received in evidence and marked Defendants' Exhibit "A-58.")

Mr. ALLEN.—That is all.

Mr. KERR.—We had expected to call John Davis, of John Davis & Company, who testified in the former trial, but he is in New York. Now, we had expected Mr. Alper to be here to-day. I hold in my hand a telegram from him, which I will show to your Honor. He will probably be here in the Shasta Limited to-night. I didn't suppose the case would close so soon.

Mr. SCHLESINGER.—Your Honor, we may, if we

have any rebuttal, want to call a character witness, Mr. Echsteine, if he should be here in the course of the afternoon. If he shouldn't come, then we will rest for Mr. Goldberg.

The COURT.—Well, call the next witness.

Mr. SCHLESINGER.—I would like to have this understanding with counsel, if the rebuttal carries the case over till morning I want the opportunity to put Mr. Alper on on his arrival.

The COURT.—If he arrives. Here is your telegram.

Mr. ALLEN.—If there is any likelihood of Mr. Alper getting here I am perfectly willing to let their case remain open. We want to see Mr. Alper as badly as they do.

Mr. SCHLESINGER.—We used every possible effort to get him here, as this telegram will show.

The COURT.—Call the next witness.

Mr. VANDERVEER.—Defendant Corder rests.
[1198—1145]

The COURT.—Meyer rest?

Mr. KERR.—We rest.

The COURT.—Did you rest, Mr. Shipley?

Mr. SHIPLEY.—We rest, your Honor.

The COURT.—And Goldberg rests?

Mr. SCHLESINGER.—Yes, your Honor.

WHEREUPON ALL OF DEFENDANTS REST
THEIR CASE IN CHIEF. [1199—1146]

[Testimony of G. E. Lockwood, for Plaintiff
(Recalled in Rebuttal).]

G. E. LOCKWOOD, recalled in rebuttal as a witness on behalf of the plaintiff, further testified as follows:

Direct Examination.

(By Mr. ALLEN.)

Q. You have been sworn, I believe?

A. Yes, sir.

Q. Mr. Lockwood, calling your attention to Plaintiff's Exhibit "8," and more particularly to the condition of your metal warehouse—you are now and have been since along prior to 1908 the custodian or the man in charge of the metals warehouse; isn't that true?

A. Well, I have been in charge there practically since about November, 1907.

Q. Since November, 1907? A. Yes, sir.

Q. You were in charge, then, Mr. Lockwood, during all the time that those entries were made on this exhibit "8"? A. Yes, sir.

Q. For this particular kind of zinc?

A. Yes, sir.

Q. Mr. Lockwood, do you recall, during the year 1907 or 1908, did you ever at any time issue to the battleship "Kearsarge," or any other ship, 15,000 pounds of zinc of that particular size?

Mr. SHIPLEY.—We object to the question as not rebuttal, for the reason that the issue tendered by the defendant did not go to the actual amount issued from the Storekeeper, but to the fact that the lan-

(Testimony of G. E. Lockwood.)

guage on the requisitions called for a certain amount; that this evidence is not responsive to any issue tendered by the defendant. We don't question the amount this [1200—1147] man actually issued.

Mr. ALLEN.—That requisition, your Honor, is the one that Mr. Meyer, that I went over with Mr. Meyer for a long period of time.

The COURT.—Is it the requisition that says that or is it—

Mr. ALLEN.—The requisition says "1500 S," or something of that sort, and he said it meant 1500 *hundred* plates, which would be about 15,000 pounds.

Mr. SHIPLEY.—The requisition calls for 1500 zines, and Mr. Meyer's contention is that calls for plates.

Mr. SHIPLEY.—We are not disputing the accuracy of this record as to the amount that was actually delivered.

Mr. ALLEN.—I will show your Honor the item (exhibiting paper to the Court). The witness stated he didn't conceal that item and didn't mislead him, but they have attempted to show there is some discrepancy or disparity here.

Mr. SHIPLEY.—Between the amount called for and the amount that was actually taken out of stock, yes.

The COURT.—I think he can answer the question, if you know.

Mr. ALLEN.—Read him the question.

Mr. SHIPLEY.—My objection to it is, it is rais-

(Testimony of G. E. Lockwood.)

ing a false issue, one not tendered by the defense. We are not questioning the amount delivered, but he was justified because of the call—

Mr. SHIPLEY.—Exception.

Mr. ALLEN.—Read him the question.

Q. (Question repeated.) A. No, sir.

Q. Never did? A. No, sir.

Mr. SHIPLEY.—We move to strike the answer and question as not an issue in this case, and tending to throw no light upon any issue [1201—1148] in this case before this jury.

The COURT.—That part of the answer that goes to any other ship will be stricken, but that part that goes to this particular one under this particular requisition may stand, and an exception is noted.

Mr. ALLEN.—Did you attempt to check these different items over with some care occasionally to see whether or not your cards did, as a matter of fact, correspond and tally with the card, whether the amount on hand tallied with the card?

A. Well, quite frequently we inventoried the stock to see the amount of stock on hand checks with the quantity called for on the card.

Q. On the card? A. Yes, sir.

Q. You never found any discrepancy of 15,000 pounds? A. No, sir.

Mr. ALLEN.—That is all.

On cross-examination by Mr. SHIPLEY said witness testified as follows:

Q. Mr. Lockwood, if a call came in to you to furnish a certain number of articles, such as gaskets,

(Testimony of G. E. Lockwood.)

say, 1500, would you issue that by weight or by numerical number as called for?

A. Well, I couldn't very well answer that question, because I have never handled that particular class of goods.

Q. Well, I say, if it came in calling for articles of a specified number, 1500 articles of a certain kind, how would you issue it, I say, by the number called for or by weight?

A. Well, it would depend on the way we had them on charge. If we had them on charge, we sold them by the pound, we would simply count out 1500 gaskets, weigh them and charge the ship [1202—1149] with whatever the weight might be.

Q. But you would actually issue the 1500 called for, would you not, if the call was for 1500 numerically of a certain article?

A. Unless—now, that is a thing that quite often happens. A ship's requisition comes in, and we see that it calls for something that is out of the ordinary. For instance, they start in with a number of items that run by the foot; they come down to where they call for an item, we know that the item should be by pounds, and they forget to change it to pounds and let it run on feet. Well, in that case, when it is a mistake, they have made a mistake in writing out the requisitions, we make inquiries and get it straightened out before we fill that particular item.

Q. But I say, if the call is for a certain article requiring a certain number of a certain thing, then that is the specification that controls, is it not?

(Testimony of G. E. Lockwood.)

A. Well, it is unless it would look something out of the ordinary, then we would make inquiry about it.

Q. Something that was an impossibility, for instance?

A. Well, if it was something that we knew absolutely was wrong—

Q. Now, for instance—

Mr. RIDDELL.—Let him answer the question.

A. What I mean to say, if they call, for instance, for 1500 gaskets, or whatever it might be, and we know it was clear out of reason, they didn't want that, we would make inquiries before we filled that particular item.

Mr. SHIPLEY.—Would there be anything in the call for 1500 gaskets that would be unreasonable, or show it wouldn't be delivered by counting out the number of gaskets called for?

A. We might know ourselves it was an unreasonable amount and that [1203—1150] the ship had no use for that many. In that case we would make inquiry before we went ahead with it.

Q. Did you, as warehouseman of the Puget Sound Navy Yard, have it in your discretion to question the rightfulness of the technical officer aboard a ship to call for a specific number of a certain article?

A. I had a right at all times to take it up with the Chief Clerk of the department, or the Record Order clerk, who has charge of the ship's requisitions, and make inquiry from him and get instructions from

(Testimony of G. E. Lockwood.)

him, if I wasn't satisfied with the way the requisition read.

Q. What is controlling about the article that shall be furnished, your particular ideas or a requisition under the authorization of the proper naval officer?

A. I don't claim that I have any authority at all. I simply would take it up through proper channels and get my instructions from people that was over me before I would make it.

Q. And what would be finally controlling?

A. Well, as I say, we might find this requisition was in error, this item had been wrote out wrong, then the people in authority would order me to change it a certain way.

Q. Well now, with that explanation, suppose a call came in on a ship's requisition calling for 200 zincs, boiler, 12 by 6 by $\frac{1}{2}$, what would you issue on that call?

A. I would issue 200 zincs, because that would be a very small amount.

Q. You would issue 200 zincs, and you would weigh the zincs and charge on your card the weight of the zincs, wouldn't you? A. Yes, sir.

Q. And you would issue it because it called numerically for 200 [1204—1151] zincs, would you not?

A. Because it called for 200 zincs, because I would know that was not out of the ordinary, and it would be perfectly right to fill it.

Q. Did you have technical knowledge sufficient to put your opinion above the chief engineer aboard of

(Testimony of G. E. Lockwood.)

a battleship as to the amount of zinc that was proper to furnish a ship?

A. I never questioned his ability, but I would question the man that had made out the requisition, knowing that he might have made a mistake.

Q. If a call came in for 300 zines, what would you issue?

A. I would weigh out 300 zines and deliver them to the ship, issue them.

Q. Suppose there was a call came in for 500 zines, what would you issue?

A. I would weigh 500 zines and issue them.

Q. Suppose there came in a call for 1,000 zines, approved by one of the superior officers of the navy, what would you issue?

A. Well, I would keep on issuing the number called for until, as I say, it looked like an unreasonable amount, something a great deal larger than I had ever issued to any ship before, then I would begin to ask questions of people over me.

Q. At what point would you stop issuing according to the call because it was unreasonable, or in excess of a reasonable specification?

A. Well, when I seen that the amount run up considerably more than I had ever issued to any other ship, why, I would naturally feel suspicious about it, think it was an error in writing out the requisition, and I would inquire through the Record Order clerk more than likely to find out if that was really right, if they [1205—1152] meant zines or meant pounds, then he would have instructed me what to do.

(Testimony of G. E. Lockwood.)

Q. Now, as I understand your position,—I am not trying to put you in a false light before this jury—your position was simply this: If there was anything of that kind which suggested itself to your mind that there might be a clerical error, you would call that to the attention of the proper clerk in the Storekeeper's Office? A. Yes, sir.

Q. And have him advise you?

A. He would probably write the ship's officer, or telephone them, whatever way he would get in communication with them, and instruct me.

Q. Let me ask you this question, which I think will clear up the situation: Is it not a fact these ship's requisitions, in passing through the Storekeeper's office, over the desk of the proper clerk before they went to you to be filled, were checked and initialed with a letter "D" and a letter "S," the letter "D" meaning to be on delivery, the letter "S" to be filled from stock, that it was initialed that way opposite the item? Isn't that shown on all these requisitions?

A. I don't remember anything like that before a requisition come to me. There was a time that they done it a little bit different from that. The clerk in the office made out what we call "initialing transfer." He copied off the items off the requisition the different storemen were supposed to issue and sent them out to us and we would fill from this transfer. In that way we didn't see this ship's requisition at all.

Q. Now, calling your attention to the particular exhibit "A-21," the ship's requisition for the "Kearsarge," and to item 206, and so you can see just the

(Testimony of G. E. Lockwood.)

shape itself, item 206 reads, in the [1206—1153] opposite, the column number, the unit number, is “sheets,” isn’t it? A. Yes, sir.

Q. The word “sheets”? A. Yes, sir.

Q. Then immediately in the next line below, underneath the word “sheets,” is the word, or the abbreviation, “No.” A. Number.

Q. That means for the number? A. Yes, sir.

Q. The number of the articles that is to be called for opposite that? A. Yes, sir.

Q. Opposite that comes “1500,” doesn’t it?

A. Yes, sir.

Q. Now, you would read that, as it came to you, as specifying 1,500 separate zins, reading that?

A. That is the way it reads as it is written there.

Q. Absolutely, isn’t it? A. Yes, sir.

Q. There can’t be any question about that, Mr. Lockwood?

A. But there never was delivered—

Q. No, I don’t question that, the stock card doesn’t show the delivery. The question is, what is the meaning of that requisition?

A. That requisition reads all right enough 1,500 zins.

Q. As it passed through Mr. Meyer’s hands it was a demand upon the Storekeeper to furnish this ship with 1,500 zins, wasn’t it?

A. That is the way the requisition reads there.

Q. There can’t be any doubt about that?

A. I am not questioning that. [1207—1154]

Q. I am not questioning your accuracy, Mr. Lock-

(Testimony of G. E. Lockwood.)

wood, nor the record you made, it is simply the question of what this requisition called for.

Mr. SHIPLEY.—That is all.

On redirect examination by Mr. ALLEN said witness testified as follows:

Q. Mr. Lockwood, if you ran your eye further out along the same line and saw that the estimated cost was at \$225.00, you would know that wasn't 15,000 pounds of zinc, wouldn't you? A. Yes, sir.

Q. You would know it was 1,500 pounds of zinc that was meant? A. Yes, sir.

Mr. ALLEN.—That is all.

On recross-examination by Mr. SHIPLEY said witness testified as follows:

Q. Were you concerned, in filling these requisitions, in the estimates that were put on there by the ship's officers, if you had the goods in stock?

A. Well, I was to an extent, yes. If it was an unreasonable amount, and I had reason to think they had made a mistake in writing out the requisition, which often occurs. It occurs now every week.

Q. That would be simply a matter of calling attention to a possible clerical error? A. Yes, sir.

Q. So far as what the articles cost, if you had them in stock it wasn't a matter that concerned you, what figure the ships' officers put on it, was it?

A. Well, a great many times I wouldn't look to that amount at all, [1208—1155] the estimated cost, but in case I did I would notice right away there was something wrong with their estimate.

(Testimony of G. E. Lockwood.)

Q. In other words, you would have figured there is something peculiar if a ship's officer, in his opinion, put a different estimated price from what you knew you were paying, or ought to pay here?

A. Well, if I knew it was clear out of reason. Of course, their estimates vary some, we know that.

Q. But the question I am getting at is, whether your department over there was controlled in any measure by the cost which was put on there as an estimate by the ship's officer?

A. Well, I don't know that there really were. I don't really know how they handled that part of it; I never gave that much thought.

Mr. SHIPLEY.—That is all.

(By Mr. VANDERVEER.)

Q. Mr. Lockwood, are you familiar with the equipment of those ships, the matter of engines and boilers and things?

A. Well, I couldn't say I am to any great extent.

Q. Some of them have twenty, twenty-four and twenty-five boilers, haven't they?

A. Well, I don't think any of them have twenty-four boilers.

Q. Twenty boilers. You don't think any of them have twenty-four boilers?

A. Well, I couldn't answer that accurately.

Q. Some of them have twenty boilers, isn't that a fact, that have been in that yard?

A. Not to my knowledge. I don't know. I didn't know any of them had over twelve boilers.

(Testimony of G. E. Lockwood.)

Q. And they require re-zincing every three months, don't they?

A. That I don't know. That is out of my line of business. [1209—1156]

Q. And they take thirty-five plates to each boiler?

A. That is clear out of my line of business.

Q. That is 14,000 pounds of zinc in six months for the twelve boilers?

A. I don't know a thing about it.

Q. How, then, can you pass upon these requisitions and say whether they are reasonable or unreasonable?

A. I didn't pass upon them, sir. You are mistaken.

Mr. VANDERVEER.—That is all.

Mr. KERR.—If counsel will consent, we would like to put Mr. Echsteine on the stand. [1210—1157]

[Testimony of Nathan Echsteine, for Defendants.]

NATHAN ECHSTEINE, produced as a witness on behalf of the defendants, being first duly sworn, testified as follows:

Direct Examination.

(By Mr. KERR.)

Q. State your full name to the jury, Mr. Echsteine.

A. Nathan Echsteine.

Q. You reside in Seattle? A. Yes, sir.

Q. What is your business, Mr. Echsteine?

A. I am vice-president of the Schwabacher Brothers, incorporated.

(Testimony of Nathan Echsteine.)

Q. And how long have you been connected with Schwabacher?

A. Between fifteen and sixteen years.

Q. Are you acquainted with Emar Goldberg?

A. Yes, sir.

Q. How long have you known him, Mr. Echsteine?

A. Probably six or seven years; maybe a little longer.

Q. Have you known him intimately?

A. In a general way.

Q. Do you know what his reputation in the city of Seattle is for truth, probity and uprightness of dealings. Just answer yes or no. A. Yes, sir.

Q. State what it is, good or bad.

A. As far as I have known, his reputation has always been good.

Mr. KERR.—That is all.

On cross-examination by Mr. ALLEN said witness testified as follows:

Q. Mr. Echsteine, your observation, I presume, is confined to your personal experience with Mr. Goldberg more than anything else; [1211—1158] isn't that true?

A. My observation, or my knowledge, rather, is based on the general opinion of the public with whom I come in contact.

Q. With whom did you ever talk in regard to Mr. Goldberg?

A. That would be an impossibility for me to say, because I have talked to a great many people with reference to the matter.

(Testimony of Nathan Echsteine.)

Q. Will you name one of them, Mr. Echsteine, with whom you discussed this matter of his probity and integrity and the like?

A. Mention Leo Schwabacher—it would be impossible for me to give the names of people, because I talked with a great many people in the course of a day, and talk about a great many people and a great many subjects.

Q. He is your same race, isn't he? A. Yes, sir.

Q. And probably take more interest in Mr. Goldberg for that reason than possibly if he was not; isn't that true?

A. I don't believe that would influence me in the least.

Q. You mean to say, your testimony is he has never mistreated your house or yourself in a business way; is that right? A. No.

Q. He has never mistreated your house or yourself in a business way?

A. I didn't understand that was the question. I thought the question was what my opinion of his general character around town was.

Q. Yes, but Mr. Echsteine, he has never mistreated your house or your business concern?

A. No, sir, not as far as I was concerned.

Q. And that would naturally affect your judgment one way or the other? A. Yes, sir.

Q. And you don't know anything about his relation toward the United States Government in the purchase of supplies? [1212—1159]

A. No, sir, none whatever.

(Testimony of Nathan Echsteine.)

Q. You never looked into that?

A. No, sir, none whatever; never did.

Q. You never heard of the settling up with the American Iron & Metal Company?

A. I know nothing about that case, except what I have seen in the newspapers.

Mr. ALLEN.—That is all.

On redirect examination by Mr. KERR said witness testified as follows:

Q. You are a member of the School Board in the city? A. Yes, sir.

Mr. KERR.—That is all. [1213—1160]

[Testimony of E. K. Reilly, for Plaintiff (Recalled in Rebuttal).]

E. K. REILLY, recalled in rebuttal as a witness on behalf of the plaintiff, further testified as follows:

Direct Examination.

(By Mr. ALLEN.)

Q. Mr. Reilly, what is your vocation, please?

A. Auditor Seattle National Bank.

Q. Seattle National Bank. And what is your position there? A. Auditor.

Q. Mr. Reilly, did you have, in the year 1908, a deposit in your bank by J. A. Kettlewell?

A. I did.

Mr. SCHLESINGER.—How do you spell your name, please?

A. R-e-i-l-l-y.

Mr. SCHLESINGER.—I want to show what his nationality is. [1214—1161]

[Testimony of Ray Spear, for Plaintiff (Recalled in Rebuttal).]

RAY SPEAR, recalled *to rebuttal*, as a witness on behalf of the plaintiff, further testified as follows:

Direct Examination.

(By Mr. ALLEN.)

Q. Mr. Spear, what was the custom in vogue at the Puget Sound Navy Yard during your incumbency there from January, 1908, down through the months of January, February, March, April, and later of the same year, with reference to the action of departments in attempting to obtain material for use in their departments?

A. Well, of course, the yard departments were not supposed to make requisitions, that is, an open purchase requisition, for any article that was in store. They would first send their shopman over to the storehouse in an attempt to draw this particular article, and he would usually ascertain the article was not there. He would report that fact back to his own office, that is, the manufacturing department of the yard, and it was then the usual custom for the head of the department, Steam Engineering Department, or the Construction & Repair department, to call up the office, that is, the General Storekeeper's office,—

Q. That was the office in which you and Mr. Meyer were located?

A. Yes, sir. And they usually inquired as to whether we expected to receive any of that material into store in the near future, and if not they would usually ask for the information necessary for them

(Testimony of Ray Spear.)

to make up a requisition in order to obtain some of that material.

Q. To whom would this inquiry be personally directed?

A. Well, I have given that information myself personally a great many times, and I assume in my absence that the Chief Clerk, Mr. Meyer, would have to answer the telephone. [1215—1162]

Q. He would perform that same duty if you didn't perform it, as a matter of fact, would he not?

A. Yes, sir.

Q. And it was the duty, then, of yourself, or the Chief Clerk, or to whoever the inquiry might be addressed, to furnish those different departments the possible estimated cost?

A. I have followed that procedure a great many times myself, and I presume it has been followed a great many times by others in the office.

Mr. ALLEN.—Mr. Spear, did you ever at any time give to Mr. Meyer, your Principal Clerk, authority to sign your name?

Mr. SHIPLEY.—We object to this. The matter was thoroughly gone into, the letters have been submitted to Mr. Spear here in the presence of this jury, and he has denied it, stated that he wasn't there and that he knew nothing about his name having been signed there.

A. I stated I might not have been there on that particular date, that I didn't recall.

Mr. SHIPLEY.—Well, that as I remember, is the statement made in the presence of the jury.

(Testimony of Ray Spear.)

The COURT.—He may answer the question. He was interrogated with relation to this one letter on that one day, but Mr. Meyer's testimony went further.

Mr. SHIPLEY.—Exception.

Mr. ALLEN.—Yes, sir. Read him the question.

Q. (Question repeated.) A. No, sir.

Q. You never did? A. No, sir.

Q. Did you ever know, until you came into this court and sat here [1216—1163] in the courtroom and this letter was presented to you, did you ever know that Mr. Meyer, had on any occasion, ever signed your name to any communication going out of that office? A. No, sir, I did not.

Mr. SHIPLEY.—Object as incompetent, irrelevant and immaterial, and not rebuttal evidence.

The COURT.—He may answer.

Mr. SHIPLEY.—Exception.

A. No, I do not recall any other circumstance of that nature. I would like to explain that.

Mr. ALLEN.—Go ahead.

A. (Continuing.) It was quite the practice of the office, on duplicate papers of the office that went out, to use a rubber stamp of my name to avoid signing six times on one paper.

Q. But that was not a stamp purporting to be anything like your signature?

A. No, sir, it was a stamp.

Q. Of your name printed out? A. Yes, sir.

Q. Mr. Spear, I will ask you with reference to the duty of requirements of your office in regard to

(Testimony of Ray Spear.)

checking up ships, checking up the requisitions from ships which would come to your office as regards their proper allowance. What were your duties in regard to that, and what did you do?

A. We have a division in our office called the Store Order Section, or sometimes known as the Ships' Requisition Section, that has on file in that particular department all the allowance books of the various ships that are placed on the yard. When a ship's requisition comes in, the first thing, after giving it a record number, about the first thing that is done with that is to check over the items to see they are not in excess of the quantities [1217—1164] that have been allowed by the respective bureaus back in Washington. Now, ships quite frequently, through error, or sometimes through inattention, will ask for a great deal more material than entitled to, and I suppose a great many more times more material is issued than they are entitled to, but we try to stop that sort of thing.

Q. As a matter of fact, that is one of the duties of your office, to stop that? A. Yes, sir.

Q. Can you tell, by reference to this book (handing book to witness), what the allowance was for a ship the size of the "West Virginia," or the "Kearsarge," more particularly the "Kearsarge," what would be the approximate allowance?

A. This was probably the allowance at one time. Whether this is the allowance now or not, I don't know.

Q. You are acquainted, in a general way, with

(Testimony of Ray Spear.)

allowances for zinc of this size? A. Yes, sir.

Q. What would be the approximate allowance annually, or semi-annually, whichever way you want to compute it?

Mr. SHIPLEY.—You asking him for semi-annually or yearly allowances?

Mr. ALLEN.—State either way.

Mr. SHIPLEY.—He ought to be confined to one or the other.

Mr. KERR.—That question is as to the witness' information outside of that record, it seems to me, your Honor. He can ask him whether he knows.

The COURT.—If he knows. He can refresh his recollection from that and then testify.

Mr. ALLEN.—He said he would testify from that.

Mr. KERR.—Well, that is the best evidence, if the Court please.

Mr. SHIPLEY.—I think that was on page 131.
[1218—1165]

The WITNESS.—What page?

Mr. SHIPLEY.—131.

A. This shows that a ship of the "West Virginia," or an armoured cruiser of the first class, is entitled to 2,000 pounds for six months' period; that is, be a total of 4,000 pounds for a year.

Mr. ALLEN.—What are the requirements of an armoured cruiser of the first class as compared with a battleship of the type of the "Kearsarge" in the manner of amounts of zinc plates for boilers?

A. Well, a cruiser and a battleship of the same total—the armored cruiser would require more en-

(Testimony of Ray Spear.)

gineering supplies than the other; they are higher power and have more boilers.

Q. And necessarily require more boilers of the type of the "Kearsarge"?

A. Yes, sir. You understand, the essential powers of a cruiser are her speed.

Q. She has more horse-power and more boilers generally? A. Yes, sir.

Q. But less fighting capacity, is that it?

Mr. ALLEN.—Mr. Spear, I wish you would describe to the jury the relation and commission of Mr. Meyer with reference to the inspecting calls both before and after the arrival of the zinc, or any other material. What would be his duties?

A. I didn't quite understand your question, Mr. Allen.

Q. (Question repeated.)

A. Well, of course, the Inspection Call Clerk is a subordinate directly under Mr. Meyer, and he would control his actions to a certain extent in routine matters, as to the preparation and the checking of the bills on the inspection call against the inspection call, and so forth, general supervision. [1219—1166]

Q. What was the arrangement—

A. (Continuing.) He could give him any instructions, of course, he saw fit to give this man, as naturally he would as Chief Clerk to any clerk in the office.

Q. What was the relation existing between Mr. Meyer and the subordinate officer who more or less generally checked up this material under the inspection call.

(Testimony of Ray Spear.)

A. Why, he naturally came in contact with him a great deal. Just what his relations were, I don't know, sir.

Q. I know, but I am asking you about this: Were these inspection boards more or less directed and controlled in their action as regards acceptance of material by the representations made to them from your office as to the necessity for the material?

A. A great many times, if we expressed a wish to have that material passed, it would be passed.

Q. It would be passed? A. Yes, sir.

Q. Mr. Meyer has made this request on this subordinate officer?

Mr. SHIPLEY.—Now, if you know, Mr. Spear.

A. I say I don't know, as a matter of fact. I could do it; I could have it done. I don't know what Mr. Meyer used to do along that particular line.

Q. In the event that material was at the yard, and your department thought it necessary that that material be accepted, and you were not personally present, who would be the authorized officer to act with reference to the matter?

Mr. KERR.—We object, your Honor, unless this witness can testify of his own knowledge it was done by this defendant on some occasion.

The COURT.—He can testify who would be the responsible party.

Mr. KERR.—He hasn't testified there was yet any person with authority to do that kind of thing.

[1220—1167]

The COURT.—Oh, he can answer. Read the ques-

(Testimony of Ray Spear.)

tion. (Question repeated.)

Mr. KERR.—The question is now, who had authority to do that. We object unless such authority was lodged in some person.

The COURT.—I am afraid we don't understand each other. I have ruled out the other rightfully, but who was responsible for the reception of those things?

Mr. KERR.—That, your Honor, we submit is a matter of conclusion purely. Responsible for what? For inducing superior officers to act in disregard of their duties? How could such a responsibility be rested on such a clerk?

The COURT.—We don't understand each other.

Mr. KERR.—That is precisely what counsel is aiming at.

Mr. ALLEN.—The question, I think, is very clear.

The COURT.—Just read it.

Mr. ALLEN.—In the event that material has been inspected, and the inspection officer was about to make their return, and, for reasons or lack of reasons, referred to your department, it was thought best that that material should be passed and accepted by the Board, and in the event you were not personally present what officer would be responsible for the action of your department?

Mr. KERR.—We object as an improper question, assuming something that could not by any propriety have existed, and absolutely in contravention of the regulations.

The WITNESS.—I think I can clear up the whole

(Testimony of Ray Spear.)

situation if you will let me explain to the jury.

The COURT.—Well, see what you have got to say.

A. It very often happens that material was delivered on the yard and, in some very minor detail, varied slightly from the specification. For instance, packing. The specifications at times [1221—1168] will vary as to packing, the stencil mark on the outside of the box, and technically many times, if we followed strictly the regulations, the material should be rejected. The inspecting officers, in a case like that, would come to me and ask what we better do about that. And it depended a great deal of the time—if we needed the material very badly I would recommend to the Board of Inspection they waive that detail, and accept the responsibility myself. I have recommended many times to the Board of Inspection that material be passed that did not come up to specifications, not so much the quality of the material as to the technical matter.

The COURT.—Now, let him answer who acted for him when he was not present.

Mr. VANDERVEER.—There seems to have been no testimony regarding any such action. They don't claim that the rejection of this 1300 pounds of zinc was any such action as the witness testified to.

The COURT.—Well, let him answer. Note an exception.

Mr. ALLEN.—Read the question.

Q. (Question repeated.) It would be one of your subordinate officers. Who was that?

A. It would be Mr. Meyer.

(Testimony of Ray Spear.)

Q. Before Mr. Barnes came there it would be Mr. Meyer? A. Yes, at this particular time.

Q. What was the ordinary and customary procedure, Mr. Spear, in the event of a requisition being sent to the Navy Pay Office in the City of Seattle, and the purchase was attempted to be made in more than ten per cent above the amount of the estimated cost made in your office?

A. Well, in the event that the Navy Pay Office here in Seattle [1222—1169] was unable to obtain bids within the estimate, or within ten per cent of the estimate, the usual practice was to send all bids, accompanied by a letter, over to the navy yard for recommendation of my office, or of the office that originated the requisition.

Q. In other words, it was a reference back to your office for you to check back again the amount of the estimate?

A. The letter usually included a memorandum for our source of estimate, that is, to find out where we had—

Q. The action of the navy office on this side, then, was controlled by the amount of that estimate?

A. To that extent, yes.

Mr. ALLEN.—That is all.

On cross-examination by Mr. SHIPLEY said witness testified as follows:

Q. That is, you mean by that, Mr. Spear, it was limited as to the maximum? A. Yes.

Q. The top price was controlled? A. Yes.

Q. Within a certain limit? A. Yes.

(Testimony of Ray Spear.)

Q. Excess of ten per cent. And if the estimate placed upon a requisition originally had not been sufficiently liberal so that the bids called for fell within the estimate, then that necessitated the requisition and the papers going back either to your office or the other department requisition office in which the requisition was originated?

A. Yes, sir, that is correct. [1223—1170]

Q. And then if the particular department, say the department of Steam Engineering, or the Naval Construction department, or any of those departments, other than yourself or in your department, desired to take additional action, either to have an authorization by some superior officer to the purchaser at the increased price, then it was up to you to take that action?

A. Make whatever recommendation with that the matter warranted.

Q. And if, under those conditions, you really needed the article, and it was necessary to get an authorization of the department at Washington, it necessitated the sending of the papers to Washington?

A. Yes, sir, unless it was a requisition on a later date approved by the Commandant. The Commandant could give that authority.

Q. The Commandant had power to do that if it was an emergency?

A. Yes, sir, he can do anything on emergencies.

Q. That was a later date?

A. What I mean, before the starting of this "L" series.

(Testimony of Ray Spear.)

Q. As a matter of fact, the Commandant, as a matter of doing away with details, has power to do anything that is absolutely necessary to be done in the way of an emergency?

A. Yes. As a matter of fact, the Commandant of a naval station can do practically anything he sees fit.

Q. As a matter of fact, he doesn't exercise that power ordinarily unless there is some emergency for immediate action? A. Yes, sir, that is correct.

Q. Ordinarily, under the ordinary procedure, the paper would go back to Washington?

A. Yes, sir.

Q. Where there is sufficient time?

A. Yes, sir. [1224—1171]

Q. And if the original estimate had been inserted in the requisition at a liberal enough price, then that would all have been dispensed with, would it not?

A. Yes, sir, that would have been dispensed with.

Q. And is it not true, as stated by you under your former examination, that the chief purpose of the estimate put upon the requisition in your office is to notify the chiefs of the department in Washington of what you are proposing to do here?

A. Well, that is partly the case.

Q. You stated that was the primary object in your former examination of placing the estimate on there, is that not a fact?

A. Yes, sir, that is a fact. It also answers an additional purpose, however.

Q. There is a secondary purpose of fixing a check?

(Testimony of Ray Spear.)

A. Yes, sir.

Q. Which cannot be exceeded by more than ten per cent? A. Yes, sir, that was the other purpose.

Q. And it does not, however, serve any purpose—

A. At least it gives us that chance to have it referred back in the event there is an increase in price.

Q. But it does not subserve any purpose in so far as limiting the Paymaster who does the purchasing from securing as low a price as possible, does it?

A. Of course, we always try to get it as low as possible.

Q. What I mean is, it isn't put there for the purpose of giving any limitation to the Purchasing Pay Office so far as the low price of the amount actually paid is concerned? A. No, sir.

Q. The purchasing part of it is a function of the Purchasing Pay Office? [1225—1172]

A. Yes, sir.

Q. Limited, as you stated, to that maximum—

A. You understand, the Purchasing Pay Officer is here under the direct supervision of the Commandant of that navy yard, and he can give him such orders as he sees fit.

Q. In other words, it isn't really absolutely binding upon him, you mean? Is that what you mean?

A. How do you mean, sir?

Q. How is that?

A. I don't quite understand your question.

Q. I don't understand your answer.

A. I say, you understand the Purchasing Pay Officer here in Seattle is under the orders of the Com-

(Testimony of Ray Spear.)

mandant of the navy yard at Bremerton.

Q. Oh, it is a co-ordinate branch of your department?

A. Yes, sir, it works in co-ordination with our department.

Q. So far as you are concerned, the Purchasing Pay Officer has the control of the purchases?

A. He hasn't altogether. That isn't correct, Mr. Shipley, because the Purchasing Pay Officer would not dare to do anything or make an award against our recommendation, which would be probably approved by the Commandant of that yard. In other words, he is not independent altogether; he has no independent authority here at all.

Q. No, but so far as the sending out of the proposals and the placing of the awards within the estimate he is not controlled by your office?

A. That is entirely within his discretion.

Q. That is the question I am asking about.

A. Yes, sir. All things being equal, the low bidder gets the [1226—1173] business.

Q. Supposed to? A. Supposed to.

Q. Providing there is a square deal in the Purchasing Paymaster's office? A. Yes, sir.

Q. Now, you testified, if I understood you correctly, that where material was wanted by any of these five departments in the navy yard, that they would send their man over to the storehouse for the purpose of ascertaining whether the articles required were in stock?

A. No, they would usually have a regular sub-

(Testimony of Ray Spear.)

requisition on the theory that the stuff was there, and we would have to eliminate that particular item from that requisition.

Q. They what?

A. They would come over with a sub-requisition for the material they wanted, and usually we would have to eliminate the item we were out of, eliminate it from that particular requisition and furnish the other items.

Q. That would be set aside for them? A. Yes.

Q. The stuff they wanted?

A. The stuff that was on hand.

Q. Then if it was not in stock then a requisition would issue for the purchase?

A. That would probably be one of the steps; but the very next step would be, the foreman, or the man who had been at the storehouse, probably reporting back to his office we didn't have it, he was unable to obtain it.

Q. And the purchase requisition would have to issue then to secure [1227—1174] the articles you didn't have in stock? A. Yes, sir.

Q. That was desired?

A. Unless, of course, we showed them that there was material due under contract and coming in in the near future. You can't make a general rule.

Q. Now, you said that on some occasions the people attached to these other requisition offices in the other departments would inquire from you personally as to prices and information which they required?

A. The officers of the other departments would

(Testimony of Ray Spear.)

frequently call me up, yes.

Q. Now, you will not state to this jury, will you, that these same departments did not also make inquiries to dealers and merchants here in the city direct?

A. No, indeed, sir; I am not making that statement. I think they quite frequently did.

Q. And it was just as proper for them to make that inquiry and ascertain those facts from the merchants and dealers as it was to go to you for it, was it not? A. All information, as a general rule.

Q. In other words, both in your departments and in the other departments, you were free and could properly resort to all means of gaining information that was accessible? A. Yes, sir.

Q. And there is nothing irregular nor improper in that being done, is there, Mr. Spear?

A. No, sir.

Q. Is it not a fact that the best interests of the United States Government was promoted by doing that thing where it was necessary [1228—1175] to gain information?

A. Why, most decidedly, yes, sir.

Q. I will ask you this question, whether there was any impropriety, either in your department or any of these other departments, in taking up the matter with merchants and dealers as to whether they would be able to furnish a particular lot of stock, or a particular article, or class of articles?

A. No, sir, there is nothing in that act itself.

Q. And if that is done for the purpose of obtaining

(Testimony of Ray Spear.)

information it is proper and subserves the interests of the Government, doesn't it?

A. Yes. It depends on what the information is going to be used for, of course.

Q. Well, I said if it is properly done?

A. Surely.

Q. In good faith, I mean? A. Surely.

Q. From the mere fact that information was given the merchants, or acquired from merchants, those facts alone do not indicate any irregularity or impropriety? A. Not a bit, sir.

Q. Calling your attention to the allowance book of the "West Virginia." Mr. Spear, is it possible for you, by referring to that book at this time, to state what the requirements of the other cruisers of the Pacific Fleet was for zinc between the 1st of November, 1907, and the 1st day of June, 1908?

A. Well, I could show you the allowance from January 1st, to July 1st, that is given there in the book, if that would serve the same purpose.

Q. State the requirements. [1229—1176]

A. Oh, I couldn't tell anything from the allowance book what the actual requirements were.

Q. That was the question.

A. No, I couldn't tell a thing by that.

Q. In other words, the allowance is an arbitrary matter that is fixed in the departments at Washington, and, as a matter of fact, actual requirements of the ships when in commission may not be the same as the allowance as prescribed; isn't that correct?

A. Yes, that is correct. The only object of the al-

(Testimony of Ray Spear.)

allowance book is that ships may have this particular fixed amount without any reference to Washington. If they want to exceed that then they have to explain it to Washington.

Q. If a ship's requisition comes in reading at the top of it "Not in excess of allowance," and when you come to notice the item you saw that, as a matter of fact, by comparison with the allowance book, it was "in excess of allowance," then it would be necessary to take the matter up with either the ship's officer who had prepared the requisition to have the requisition remoulded, or else get authority from Washington?

A. We generally draw a red pencil line through it and fix the amount ourselves, and if they complain of that they can take it up with Washington. We do it arbitrarily.

Q. They would either have to come back with a requisition "in excess of allowance," which would require them getting authority, or take the matter up with you and start a new requisition?

A. Yes, sir.

Q. I will ask you this question: Can you tell this jury from this allowance book what the allowance for the ship "California" was at that same period? [1230—1177]

A. The "California" and the "West Virginia" are sister ships, and they might vary in a few details, but be practically the same.

Q. Will you undertake to tell this jury that in the months of November and December of 1907 that the

(Testimony of Ray Spear.)

allowance of the "California" was 2,000 pounds of zinc for six months allowance?

A. No, sir, I wouldn't make that as a positive statement; it might have been amended.

Q. Counsel tried to get you to state, if you could state, from that book what the allowance of those ships were. Now, I ask you whether it is possible or not?

A. I can state the allowance. You asked me what they had drawn or consumed?

Q. No, I ask now if you can tell from that particular book that the allowance for the "California" was only 2,000 pounds of zinc for six months?

A. Well, without any further information I would say that that was the allowance for the "California."

Q. Basing it on what?

A. Basing it on the allowance of the "West Virginia," being a sister ship; but, as I say, that might have been amended in the case of the "California."

Q. As a matter of fact, may that allowance book not have been amended or changed from what it appears there?

A. Oh, indeed, yes. It is 1904, that allowance book. It has probably been amended many, many times.

Q. Now, isn't it a fact at this time you are unable to state that that particular allowance of 2,000 pounds was in force and effect?

A. No, I couldn't state that.

Q. Calling your attention to the ship's requisition for the ship [1231—1178] "California," dated

(Testimony of Ray Spear.)

November 22, 1907, I will call your attention to the fact that this requisition shows "in excess" and to the endorsement upon it reading as follows: "Each boiler uses thirty-five plates at each full renewal, which makes 560 plates, or 5,600 pounds for the ship. If the ship is kept actively at sea there should be approximately one renewal every quarter for each boiler under steam. In view of the early sailing of the vessels it is respectfully requested that the Commandant be asked to authorize immediate issue of these supplies." Underneath that, in a red stamp, "Navy Department, Bureau of Supplies & Accounts, November 30, 1907. To be supplied from the Navy Yard, Puget Sound, Washington." No signature, by some one, "Acting Chief of Bureau." "Request approval in advance. To the General Storekeeper, U. S. Navy Yard, Bremerton, Washington. Approved:—" Signed by somebody, "Captain."

Mr. ALLEN.—Is that the "California" or "Washington," Mr. Shipley?

Mr. SHIPLEY.—This is the "California." And also bearing the seal, the stamp of the Bureau of Steam Engineering, November 30, 1907. Mr. Spear, I will ask you, from that endorsement, whether it does not appear that the requirement of the "California," a sister ship of the one you mentioned, the "West Virginia," I believe it was, was for 5,600 pounds of zinc for a six months allowance?

A. Apparently so. You understand—

Q. And was authorized by the department?

A. You understand, what one engineer would get

(Testimony of Ray Spear.)

along with another engineer would think absolutely inadequate.

Q. But this bears the seal of approval of the authorities at Washington, doesn't it?

A. Yes, sir, apparently so.

Q. It is also true, Mr. Spear, is it not, that where a ship, or a [1232—1179] number of ships are preparing for a long cruise, that a more liberal allowance might be anticipated than where maybe they were going to be tied up at the dock or lay in port for a portion of the time?

A. Yes, It is very seldom, where they take on a six months allowance, it is very seldom a cruise lasts that long.

Q. But where a cruise is anticipated they prepare for it by a larger and more liberal provision?

A. Yes, sir. Not so many times on the ship themselves, as on the supply ships.

Q. And in preparing for stocking these fleets you had those matters in mind? A. Yes, sir.

Mr. SHIPLEY.—That is all. [1233—1180]

On cross-examination by Mr. KERR said witness testified as follows:

Q. And, if I understand you and your testimony, it is the custom of all of the heads of the department and persons in the employ of the Government in any capacity to sign their own correspondence?

A. Yes, sir.

Q. Not to have it signed by a clerk or assistant?

A. That is the usual practice.

Q. But in your office you never permitted the head

(Testimony of Ray Spear.)

clerk to carry on the correspondence with anybody in his own name, did you?

A. In his own name?

Q. In his own name. It was carried on in your own name?

A. He might have done that at times.

Q. Have you permitted it to be done?

A. I think I have at times.

Q. Have you any recollection of any letter ever going out of that office signed by any clerk as such?

A. Oh, yes, quite frequently.

Q. What? A. Yes, quite frequently.

Q. Well, now, if I had some business connection with the navy store over at Bremerton, or had—

A. I mean by that, Mr. Kerr, inter-yard communications.

Q. I say, if I had some business in connection with the store at the navy yard at Bremerton in 1908, I had gone over there, for instance, and wanted to make an inquiry as to the status of meeting business, and you hadn't been there, I would have communicated with your head clerk, or Mr. Meyer?

A. Very likely.

Q. Probably so? A. Very likely. [1234—1181]

Q. And he would have had authority to have answered my inquiry? A. Yes, sir.

Q. But if I wrote the same inquiry over there that I made by word of mouth, and you didn't happen to be there, he couldn't answer that inquiry by mail and use your name? A. No, sir.

Q. Couldn't do that?

(Testimony of Ray Spear.)

A. No, sir. That mail would rest—

Q. Well,—

Mr. ALLEN.—Let him answer.

A. That mail, under ordinary circumstances, unless I wouldn't be back for a few days, would lay on my desk.

Mr. KERR.—Wouldn't make any difference whether it was a mere formal matter or of some extent?

A. There is matters on my desk, Mr. Kerr, that by law are not allowed to be paid without my signature.

Q. I am talking about inquiries such as covered by this letter, and put in evidence?

A. There wouldn't be any objection to him giving you the information and signing his name to it.

Q. That same information given to you would apply to the Rear Admiral in the navy?

A. Yes, sir.

Q. I show you a letter, Charles M. Thomas, initialed SHC.

Mr. KERR.—You see that letter was written by the Rear Admiral—

A. I beg your pardon. He signed that letter himself. I know Admiral Thomas' signature, and I know he signed that.

Q. Did you see him sign it?

A. No, but I have seen a great deal of his signature.

Q. How do you know if you didn't see that signed by him?

A. I know it as I know any signature. This here (showing) means the [1235—1182] man that read

(Testimony of Ray Spear.)

that letter, meaning he O. K.'s the contents of that letter.

Q. You would have thought, if that was true, the stenographer would have put it here on one side, as they usually do, dictated by SHT?

A. I know it is true.

Q. Yet you didn't see it signed. Now, if this letter with these initials of the Rear Admiral Thomas—

A. Those are not the initials of Rear Admiral Thomas there, those are the initials of the Aide that drew up that letter.

Q. Well, whether they are or whether they are not, this letter simply encloses to the Commandant certain printed copies of a circular order and had no particular significance, did it? A. No, sir.

Q. Just purely—

A. No, sir, but the Admiral signed it, didn't he?

Q. I don't believe it, but you say so.

A. All right.

Q. But, at all events, you remember in the spring of 1908 the Carstens Packing Company had a contract to furnish the Government fresh meat at the navy yard for the year 1908, do you not?

A. I remember the firm Carstens Packing Company.

Q. You remember that in the spring of 1908, just before the fleet arrived, and you took the position your department over there, the Storekeeper's department, that the Carstens Packing Company would be required to furnish all the meat that would be required for the cruise of the Atlantic Squadron in

(Testimony of Ray Spear.)

so far as they were outfitting from this place?

The COURT.—He may answer this very shortly, I think.

Mr. KERR.—You remember that, don't you?
[1236—1183]

A. I don't remember they were required to; I think they were asked—

Q. You know they were required to—

A. Let me finish my answer. The matter was taken up with the Carstens Packing Company as to whether they would be willing to supply the fleet. They were not required to do anything, as I remember the matter.

Q. Was it proper, when I went over to the navy yard in the spring of 1908, and you were not there in the office, to have discussed it with your head clerk?

A. Perfectly proper, Mr. Kerr.

Q. Certainly. And you would probably have referred me to him if you had been there?

A. I might possibly.

Mr. KERR.—Now, you say it is not proper for the head clerk, if I had addressed a letter to him and you were not there, to have answered that letter?

A. Oh, no, he might have answered the letter, but he had no right to sign my name to it; that is, I don't remember he had.

Q. Don't you know in the entire records of the Government there was never a letter written signed by Mr. Meyer as head clerk having to do with the Storekeeper's Office?

A. So far as I know there was no letter signed by

(Testimony of Ray Spear.)

Mr. Meyer and had my name signed to it by Mr. Meyer; not that I attach any importance to this particular letter.

Q. How long were you away from the store at any one time?

A. I was away quite frequently for days at the time.

Q. Did you expect all of the inquiries made by merchants and others that went into that office, purely an informal matter, to remain on your desk for days and wait until you returned to sign them personally? [1237—1184] A. No, sir.

Q. How did you expect that I should be informed during your absence?

A. On matters of no particular importance, Mr. Kerr, I expected Mr. Meyer to get that correspondence out.

Q. You expected Mr. Meyer to dictate the correspondence, and so he did, by adding the word "M"?

A. That was apparently the way he did it.

Q. There was nothing wrong with that? You are not complaining about it in this trial?

A. No, sir, I am not complaining about it in this trial, but I said I gave Mr. Meyer no authority to sign my name.

Q. You have seen the only letter that is in here, Lieutenant Spear, with your name and initialed by Mr. Meyer with regard to a purely informal matter. Are you complaining Mr. Meyer was guilty of any wrong in having signed that letter?

A. I am not complaining of anything.

(Testimony of Ray Spear.)

Mr. KERR.—Did you have any responsibilities, Mr. Spear, in connection with your position as Storekeeper? Answer that. Did you have any responsibilities at all?

A. Yes, I had quite a number. I gave a bond for that.

Q. Did you, as an official of the Government, during the time Mr. Meyer was there, and particularly in the spring of 1908, when the Government was engaged in the important business of outfitting a squadron for a six months cruise, devote your attention to the Government's business?

A. Yes, sir, quite a bit.

Q. Did you supervise that business, and did you know it was your duty to know what was going on in the Storekeeper's Office? A. I thought I did.

Q. You thought you did. Well, there was no reason why you shouldn't do it, was there? [1238—1185] A. No, sir.

Q. Was there so much of it that you couldn't, as the responsible head of that department, have kept track of all of it? A. You are mistaken as to that.

Q. Answer my question.

A. I said you are mistaken as to that theory. It would be absolutely impossible for an officer in charge of an office of that description to check every item, or every invoice, or every bill that went over his desk.

Q. Let me ask you if it was—

Mr. ALLEN.—I submit he cuts him off again.

The COURT.—He answered.

(Testimony of Ray Spear.)

A. I indicated what my answer was.

Mr. KERR.—Was there any reason why you, as the head of that department of the Government, whose duty it is under the regulation themselves, to be advised as to the cost and value of material purchased by the Government, of not seeing to it that the prices in requisitions were the regular prices you were there to know?

A. If I could do that there wouldn't be any necessities for any clerks.

Q. Now, what were your laborious and multifarious duties that made it impossible, when all of these requisitions came to you for signature, to have cognizance or knowledge that the law required you to have?

Mr. ALLEN.—Now, I submit this is not redirect or recross-examination. If he had any doubt about what Mr. Spear was doing there he could have asked him before, and he has gone into a fifteen or twenty minute wrangle about matters that are entirely immaterial here.

The COURT.—That matter was gone into.
[1239—1186]

Mr. KERR.—The Government was in the attitude of saying—even down to the Paymaster General of the United States, simply to have ignored the duty that the law put on them. I want to know now why it was that this witness, who was the responsible head of that department, was not advised at all times, as the law required him to be, advised of the value in the market of these various materials.

(Testimony of Ray Spear.)

The COURT.—That was covered in the former cross-examination. The objection is sustained. Note an exception.

Mr. KERR.—Well, now, what did you do, then, in connection with that office, outside of signing the correspondence?

Mr. ALLEN.—That is a repetition of the same thing.

Mr. KERR.—I think I am entitled to find out what he did, your Honor.

The COURT.—No, that was gone over before. Sustained. Note an exception.

Mr. KERR.—In the performance of your duties over there, did your duties require you to do any more, and did you do any more, than sign such documents as were placed before you?

A. Oh, yes—

Mr. ALLEN.—I again submit this is the same thing.

The COURT.—You can answer it.

A. Yes, I dictated a great many of the matters that Mr. Meyer brought before me in completed form; I have outlined the policy of the office on most matters that were brought up that required any special attention.

Mr. KERR.—Did you or did you not, Mr. Spear, consider it as a matter of any importance to the Government what they were paying for the material that was being supplied for these battleships? [1240—1187]

A. Yes, sir, I considered it very important.

(Testimony of Ray Spear.)

Q. Let me ask you if that wasn't the most important thing?

A. No, that was not the important thing at that particular time.

Q. The most important thing was to assemble this stuff in time for this squadron so it could sail without delay? A. That was my primary interest, yes, sir.

Q. And that was so important that you paid no attention at all to what the Government was paying for the supplies to outfit these vessels?

A. I might have lost sight of some items, yes, sir.

Q. In other words, the urgency was so great for supplies to be assembled so the ships could get it you lost sight of the detail as to what it would cost the Government?

A. As to a great many items no doubt.

Q. Yes. That is all.

Mr. SCHLESINGER.—You attach no importance to this letter at all, do you?

A. No, not till I saw it here in this connection.

Mr. SCHLESINGER.—That is all.

Mr. KERR.—I want to ask the witness one more question.

Q. Mr. Spear, will you tell me how many hundred thousand dollars it cost to outfit this squadron, so far as they were outfitted at the Puget Sound Navy Yard, for their cruise around the world?

A. No, I haven't the slightest idea.

Q. Over a million dollars, wasn't it?

A. I don't know.

(Testimony of J. A. Kettlewell.)

Mr. KERR.—That is all.

Mr. ALLEN.—That is all. [1241—1188]

**[Testimony of J. A. Kettlewell, for Plaintiff
(Recalled in Rebuttal).]**

J. A. KETTLEWELL, recalled in rebuttal as a witness on behalf of the plaintiff, further testified as follows:

Direct Examination.

(By Mr. ALLEN.)

Mr. ALLEN.—Did you ever in the month of January or February either, borrow, or attempt to borrow, from Mr. Goldberg any sum of money, more particularly three sums of \$75.00 each?

A. No, sir, I never asked Mr. Goldberg for any loan, or never received any loan from him.

Q. What were your circumstances personally, then, in the month of January, 1908?

Mr. KERR.—I object to that.

The COURT.—He may answer the question. Note an exception.

A. Why, I deposited this check which you referred to, a thousand and fifty dollars.

Mr. ALLEN.—That bears date of January 22, 1908. You had that in your possession at that time?

A. Yes, sir.

Q. And later placed in your bank? A. Yes, sir.

Mr. KERR.—And it was cashed the 10th of February, 1908.

Mr. ALLEN.—You carried it in your pocket and deposited it on the 10th of February?

A. Yes, sir.

(Testimony of J. A. Kettlewell.)

Mr. KERR.—I object to that as not the best evidence.

Mr. ALLEN.—Well, we offer this in evidence, your Honor.

Mr. KERR.—Object to it as immaterial.

Mr. SCHLESINGER.—Not any part of rebuttal testimony.

The COURT.—Overruled. Exception. [1242—1189]

(Check referred to received in evidence and marked Plaintiff's Exhibit "87.")

Mr. ALLEN.—Your accounts from that time, along in the early part of February, show substantial balances equivalent to that during the month of February, March and April?

Mr. KERR.—Object to it as not proper rebuttal, incompetent, immaterial and not the best evidence.

A. Yes, sir.

The COURT.—Let the answer stand.

Mr. KERR.—Exception.

Mr. ALLEN.—That is all.

On cross-examination by Mr. KERR said witness testified as follows:

Q. Mr. Kettlewell, you told this jury this story, that in November or December, 1907, you suggested to the defendant Meyer that the Great Western Smelting & Refining Company were having some fat contracts with the Government, and that you and Meyer should get in and graft that company. That was your testimony, wasn't it?

A. No, sir, that isn't exactly correct, no, sir.

(Testimony of J. A. Kettlewell.)

Q. That isn't exactly right? A. No, sir.

Q. But you stated that you did suggest to Meyer that you held up the Great Western Smelting & Refining Company? A. No, sir.

Q. Make them come through?

A. No, sir, nothing of that kind; that is misleading.

Q. Well, do you retract now any of the statements you made in your former examination to this jury? [1243—1190] A. No, sir, none of them.

Q. You never talked to Goldberg, you stated, until you had rejected some of his material and he came to your office in January, 1908, was that your testimony?

A. I said that I talked to him at that time, but I didn't say that I hadn't talked to him before that time.

Q. You had never talked to him before that time about holding him up for any money, had you?

A. I never talked to him at any time about holding him up for any money.

Q. Never talked to him?

A. About holding him up for any money, no, sir.

Q. You don't use quite as harsh a term as that. What term would you use?

A. Well, what do you want to know? I don't know just what you asked me.

Q. Well, you started in, you said in November or December, about a scheme to hold up the Great Western Smelting & Refining Company, or to get some money out of them, because they were doing business with the Government. A. No, that is not right.

(Testimony of J. A. Kettlewell.)

Q. What?

A. That is not correct. I never made any statement of that kind, about holding up the Great Western.

Q. Well, did you, according to your theory of the thing, you and Mr. Meyer, put up a job to hold up the Great Western Smelting & Refining Company, or Mr. Goldberg?

A. I don't say that Meyer put up this job.

Q. I asked you, did you and Meyer together put up that kind of a job? [1244—1191]

A. There was a proposition, but it wasn't a scheme to hold up Mr. Goldberg. This suggestion—

Q. Well, to get some money out of them, then?

A. No, the suggestion came from Mr. Goldberg through Meyer to me.

Q. And you never talked to Goldberg about it yourself? A. I certainly did, yes.

Q. Well, you didn't attempt to borrow any money from Goldberg?

A. I never attempted to borrow any money from Goldberg in my life.

Q. You were as willing to have Goldberg bribe you or you bribe Goldberg, but you want the jury to understand you wouldn't borrow any money from Goldberg—that the way you want to be understood?

A. I want it understood this way, that whatever advances were made were made by Goldberg, not by me.

Q. But you didn't go out and corrupt Goldberg, but you claim Goldberg corrupted you?

(Testimony of J. A. Kettlewell.)

A. That was the idea exactly; yes, sir.

Q. And you had been dealing with the Government for a year and a half in the name of a lot of fictitious people, hadn't you?

A. I don't know how long; I forget what the testimony was, but it was correct.

Mr. KERR.—That is all.

Mr. ALLEN.—That is all.

Mr. ALLEN.—The Government rests, your Honor.

WHEREUPON THE GOVERNMENT RESTS
IN CASE IN REBUTTAL. [1245—1192]

Mr. ALLEN.—It is agreed by stipulation of counsel that a certified copy may be substituted for Plaintiff's Exhibit "87."

The COURT.—Very well.

**[Motion for Verdict in Favor of Defendant Corder,
and Order Thereon.]**

Mr. VANDERVEER.—I don't want to be laborious or tiresome to the Court in this matter, but I am honestly of the opinion there is no reason at this time the Court should not direct a motion to direct a verdict in favor of defendant Corder.

The COURT.—I will dispose of that to-morrow morning.

The COURT.—The motion will be denied.

Mr. VANDERVEER.—Exception. [1246—1193]

The foregoing contains all of the testimony and evidence, both oral and documentary, and a full and complete statement of the proceedings in the case. At the close of the argument of the respective counsel the Court charged the jury as follows, and the fol-

lowing are the instructions given by the Court to the jury:

Instructions of the Court to the Jury.

The COURT.

Gentlemen of the Jury: I desire to express to you my appreciation for the patient and diligent manner with which you have attended upon and listened to the proceedings of the trial of this cause. Many of you are busy men and have made and are making a considerable sacrifice for the purpose of discharging your duties of citizenship in the services which you render in the capacity of jurors in attendance upon the sessions of this court.

All parties connected with this case have special duties and functions resting upon them. The United States Attorney and his associate, who represent the Government in this proceeding, and the attorneys for the several defendants each have a special duty to perform; the one side to the Government of the United States, which is the people of the United States, and the other the several defendants who are charged with the violation of the laws of the United States.

The duties of the attorneys are to present to the Court and the jury all material and relevant facts which bear upon the guilt or innocence of the parties charged. In the discharge of these duties these parties necessarily appear as partisans and endeavor to present all of the facts in the most favorable light [1247—1194] to sustain their contention and theory of the matters inquired about in the presenting of the issues here. The duty to you, gentlemen of the jury,

and of the presiding Judge is very different. It is the duty of the Judge to impartially and fairly rule upon every matter that is presented and to endeavor to secure to the Government and the defendants a fair and impartial presentation of every contention which it is claimed will bear upon the issue, and to exclude, so far as it may be possible, matters which are foreign to the issue and which would not aid the jury in analyzing the testimony, or in applying the facts as found to the law, or to conclude with relation to the guilt or innocence of the defendants charged. And you, gentlemen of the jury, have a function which is separate and apart from any of the others named, and which makes you the sole and exclusive judges of the facts which are presented in this case. All these matters of fact are left solely with you. You are the sole judges of the facts. You are to take, however, the law, as applicable to this case, from the Judge.

You have been accepted as trial jurors by the United States attorneys and by the defense in this case because they all had confidence in your integrity, in your fairness, and in the belief that you would approach the issue in this case free from any bias of any kind, either for or against either party and with open minds impressionable to receive the truth as you find it from the evidence in this case; that you will not pass upon the facts in this case or arrive at any conclusion because of any desire to favor one party or the other or because of any feeling of fear either for or against either party, but that with openness of mind and acuteness of conscience approach

the [1248—1195] subject with that feeling of responsibility which the subject demands, keeping in mind the fact that the Government can only be maintained and be of service by the rigid enforcement of its criminal law, not so much out of a spirit of revenge as a desire to impress upon all people that the laws of the country, which are the rules of society, must be lived up to, and if violated, the parties will be punished. If the laws of the country should not be enforced, it would only be a comparatively short time until people would grow to disrespect law, would appreciate that law really means nothing, and this would ultimately result in a condition of anarchy; whereas, a rigid enforcement of law and an appreciation by persons living within the jurisdiction of the country that laws cannot be violated will teach a wholesome respect for law and will make for better citizenship and a better country; and for the defendants, the Government has every consideration, and they are entitled to receive the greatest consideration and not to be convicted unless the evidence shows them to be guilty. The Government would rather have many guilty men escape punishment than that one innocent man should be punished.

The fact that an indictment has been returned in this by the grand jury is no evidence that any crime has been committed. The proceedings of a grand jury is a one-sided affair. There the Government presents its witnesses to show that the criminal laws have been violated. The defendants have no opportunity to present any evidence before a grand jury. Hence the grand jury simply makes its presentment

upon the evidence, which is presented by the Government, and that is simply a paper charge against the defendants which requires them to bring into court their witnesses to explain the facts as disclosed by the [1249—1196] witnesses upon the part of the Government upon the trial of the cause. This has now been done. The United States has presented its witnesses and the defendants have presented their witnesses, and it is now for you to decide in this case from the testimony what is presented here whether the defendants did do the acts set forth in the indictment.

You are further instructed, gentlemen of the jury, that so jealous is the law of the welfare of the citizens of this country, and so careful is it to give every man every reasonable opportunity upon a criminal hearing of this kind, that this same law which makes certain acts crimes, when a man is charged with crime, provides that before he can be found guilty of the offense charged, his guilt must be established beyond every reasonable doubt. The law provides that not only must a person charged with crime be proven guilty beyond every reasonable doubt, but it provides that every person charged with crime shall be presumed to be innocent of the offense charged until he is proven guilty, and that presumption shall continue with him throughout the entire trial and until the jury is convinced beyond every reasonable doubt that he is guilty. And this presumption is not a mere matter of form, but it is one of the rights accorded under the law must be considered and given effect until the testi-

mony which is offered and admitted overcomes this presumption and convinces the jurors of his guilt beyond doubt.

The indictment is rather lengthy, while it contains only one count, it still is necessarily voluminous. The law of our country from its earliest history has required that a party charged with crime shall be given every opportunity to prepare to meet the complaint made by having such definite and explicit information upon which the facts necessary to convict the [1250—1197] defendant are predicated, so that a defendant will not be taken by surprise and not be prepared to answer the charge made. The ultimate facts are, therefore, set out in the indictment and these must be established by the Government to sustain the indictment beyond every reasonable doubt. The indictment not having been read, I will now read it. It reads, after the caption, as follows:

The grand jurors of the United States of America, duly empaneled, sworn and charged to inquire within and for the Western District of Washington, upon their oaths present:

That on the 2d day of June, A. D. 1908, and for a long time prior thereto, one Edwin F. Meyer, late of the Western District of Washington, and within the jurisdiction of this court, was an officer of the said United States, and a person acting for and on behalf of the said United States in an official capacity, under and by virtue of authority of a Department of the Government thereof, that is to say, Principal Clerk in the office of the general store-

keeper of the United States Navy Yard, Puget Sound, Washington, in the Navy Department of the United States, and at the time and during the period aforesaid, did act as such and perform the duties of such principal clerk; that by reason of his being such officer and person acting as aforesaid under the law and the regulations theretofore and pursuant to law prescribed and promulgated by the Secretary of the Navy of the said United States for the Government of his department, and the conduct of its officers and clerks, and in force at said time and during the said period, he was vested with sundry powers, duties and discretion, and amongst other things, with power, duty and discretion in suggesting and causing to be determined and in determining from time to time the minimum amount of supplies of [1251—1198] various kinds and descriptions which should be kept on hand by said storekeeper of the navy yard, Puget Sound, in the storehouse in the navy yard aforesaid, in proposing and recommending from time to time the purchase of various kinds of supplies for use in said navy yard, in devising and drafting from time to time specifications of the supplies so proposed and recommended to be purchased as aforesaid, in suggesting and causing to be issued and in issuing requisitions for the purchase thereof and recommending the approval of such requisitions by his superior officers, in suggesting and causing to be placed and in placing on such requisitions the estimated cost of the supplies therein specified, in suggesting and causing to be fixed and in fixing the time designated in said re-

quisitions within which the successful bidder would be required to deliver such supplies, in suggesting and fixing and causing to be fixed the time when such requisitions should be forwarded from the office of said storekeeper of the navy yard, Puget Sound, to the Bureau of Supplies and Accounts, Navy Department, Washington, D. C., and to the United States Navy Pay Office, at Seattle, Washington, in giving out of information in regard to such requisitions, in suggesting and devising ways and means for the receipt at said navy yard, Puget Sound, of such supplies so requisitioned as aforesaid, and in suggesting and recommending the acceptance or rejection of such supplies by the said storekeeper aforesaid.

That on the 2d day of June, A. D. 1908, and for a long time prior thereto, one J. A. Kettlewell, late of the Western District of Washington, and within the jurisdiction of this court, was an officer of the United States, and a person acting for and on behalf of the said United States in an official capacity, under and by virtue of authority of a Department of the Government [1252—1199] thereof, that is to say: Chief Clerk to the Navy Pay Officer in the United States Navy Pay Office at Seattle, Washington, in the Navy Department of the United States, and at said time, and during the period aforesaid, did act as such and perform the duties of such Chief Clerk; that by reason of his being such officer and person acting as aforesaid under the law and the regulations theretofore and pursuant to law prescribed and promulgated by the Secretary or the

Navy of the said United States for the Government of his said department, and the conduct of its officers and clerks, and in force at said time and during said period, he was vested with sundry powers, duties and discretions, and amongst other things, with power, duty and discretion in suggesting the disposition of and disposing of the requisitions for supplies received from the Storekeeper of the Navy Yard, Puget Sound, Washington, and from the Bureau of Supplies and Accounts, Navy Department, Washington, D. C., in giving notice to the public that competitive proposals and bids would be received by the Paymaster of the United States Navy Pay Office at Seattle, Washington, for the purchase of supplies for the Storekeeper, Navy Yard, Puget Sound, in the preparation of and sending out to the public of proposals containing specifications of the supplies covered by said requisitions, in suggesting and devising ways and means of receiving bids and proposals, in recommending the award and awarding contracts to the successful bidders, in suggesting the approval or rejection of the accounts rendered to said Paymaster of the United States Navy Pay Office by such successful bidder, according as such account should be fair and honest or false and fraudulent, in suggesting and recommending the payment or nonpayment of such amounts so claimed by such successful bidder to be due him for supplies furnished according [1253—1200] as such claims were honest and fair or false and fraudulent, in suggesting and causing to be issued, mailed and delivered, and in issuing,

mailing and delivering to the successful bidder the check of the Paymaster of the United States Navy Pay Office at Seattle, Washington, for and in payment of the claims of such successful bidder for supplies so forwarded to the Storekeeper, Navy Yard, Puget Sound, Washington.

That on the 2d day of June, 1908, and for a long time prior thereto, one Emar Goldberg was a resident of Seattle, Washington, in the Western District of Washington, and within the jurisdiction of this court, and was manager of the Seattle branch of the Great Western Smelting and Refining Company of San Francisco, California, a corporation theretofore organized and existing under and by virtue of the laws of the State of California and having offices in San Francisco, Chicago, Seattle, Los Angeles, St. Louis and Vancouver, B. C., said branch of the Great Western Smelting and Refining Company at Seattle, Washington, then and there being engaged in the business of buying and selling scrap iron, tin, zinc, brass, copper and kindred articles.

That on said 2d day of June, A. D. 1908, and for a long time prior thereto, one W. A. Corder was a resident of the city of Seattle, in the Western District of Washington, and within the jurisdiction of this court and was manager of a mercantile business operating under the firm name and style of W. A. Corder Company, and was engaged in the business of buying and selling machinery and machinery supplies.

That on the 2d day of June, A. D. 1908, and for a

long time prior thereto, one E. Silverstone was a resident of Seattle, in the Western District of Washington, and within the jurisdiction of this court, and was engaged in conducting a hotel located [1254—1201] in Seattle, known as the Herald, said E. Silverstone, being then and there a part owner and the manager thereof.

And the grand jurors aforesaid, upon their oaths aforesaid, do further present:

That on or about the 2d day of June, 1908, within the Western District of Washington and within the jurisdiction of this court, the said Edwin F. Meyer and the said J. A. Kettlewell, being such officers and persons in the employ of the Navy Department of the United States as aforesaid, did unlawfully and maliciously conspire, combine and confederate with the said Emar Goldberg, W. A. Corder and E. Silverstone, and with certain other evil-disposed persons whose names are to the grand jurors unknown, knowingly to defraud the United States of divers large sums of money by means of a certain fraudulent scheme devised by the said Edwin F. Meyer, J. A. Kettlewell, W. A. Corder, Emar Goldberg and E. Silverstone, and which was then and there in process of execution by them; that said fraudulent scheme was first devised, concocted and put in operation in said Western District of Washington by and between said Edwin F. Meyer, J. A. Kettlewell, W. A. Corder, Emar Goldberg and E. Silverstone on or about the first day of April, 1908, and was continuously in process of execution in said Western District of Washington by and between the said

1382 *Edwin F. Meyer and Emar Goldberg*

Edwin F. Meyer, J. A. Kettlewell, W. A. Corder, Emar Goldberg and E. Silverstone, from about the said 1st day of April, 1908, to and including the 2d day of June, 1908, and was then and thereafter in process of execution by and between the said Edwin F. Meyer, J. A. Kettlewell, W. A. Corder, Emar Goldberg and E. Silverstone, in their acts done to effect the object of said conspiracy.

That the said fraudulent scheme contemplated that, as the [1255—1202] said Great Western Smelting and Refining Company at Seattle, Washington, and said W. A. Corder Company had on hand, on to wit, the said 1st day of April, 1908, a large stock of zinc, rolled sheet, boiler plates, the said Edwin F. Meyer should with fraudulent intent issue, and cause to be issued by the United States Navy Yard, Puget Sound, Washington, a requisition for the purchase for use at said navy yard of a large quantity of zinc, rolled sheet, boiler plates, and should place and cause to be placed in said requisition on the estimated cost price of such zinc, rolled sheet, boiler plates, a price in excess of the fair market value thereof, and should place and cause to be placed in said requisition as the time in which the successful bidder should deliver the said zinc, rolled sheet, boiler plates, to the United States Navy Yard, Puget Sound, so short a time of delivery that none but merchants of Seattle and vicinity could comply with said requirements, and so that none but said merchants of Seattle and vicinity could be able to furnish said zinc, rolled sheet, boiler plates, and would be able to enter into competition

for such contract, and should, with fraudulent intent, so devise and draft the specifications contained in said requisition as to the kind and nature and quality of said zinc, rolled sheet, boiler plates, to be furnished within the said time of delivery, that none but the said Great Western Smelting and Refining Company and said W. A. Corder Company could comply with said requirements.

That from time to time the said Edwin F. Meyer should notify the said J. A. Kettlewell, Emar Goldberg, W. A. Corder and E. Silverstone of the progress of such requisition, so that they, the said J. A. Kettlewell, Emar Goldberg, W. A. Corder and E. Silverstone would be able to prevent legitimate competition. [1256—1203]

That E. Silverstone, without authority so to do, should ostensibly represent a certain alleged mercantile establishment designated as the Fowler Metal Company of San Francisco, but actually represent and act for and in behalf of said Great Western Smelting and Refining Company and said W. A. Corder Company, and should at the proper time offer for filing and file with the United States Navy Pay Office at Seattle, Washington, a proposal and bid to furnish at a price greatly in excess of the fair or true market value thereof, the said zinc, rolled sheet, boiler plates so to be requisitioned for use at the said navy yard, Puget Sound, aforesaid, purporting to be the *proposed* and bid of the Fowler Metal Company of San Francisco, but to be in reality the proposal and bid of said E. Silverstone acting for and in behalf of the Great Western Smelting

and Refining Company and said W. A. Corder Company.

That when said requisition in due course should reach the United States Navy Pay Office at Seattle, Washington, the said J. A. Kettlewell, with fraudulent intent, should send out proposals containing the specifications of the zinc, rolled sheet, boiler plates, so desired to be purchased for the use of the navy yard, Puget Sound, to a list of merchants in Seattle and vicinity, which should contain the names of no merchants other than the Great Western Smelting and Refining Company, Seattle, Washington, W. A. Corder Company, Seattle, Washington and said Fowler Metal Company of San Francisco, except the names of such merchants who were known to said J. A. Kettlewell to be unable to furnish said zinc and would be unable to bid for said contract.

And the said J. A. Kettlewell should, with fraudulent intent, examine the bids and proposals to furnish such zinc, rolled sheet, [1257—1204] boiler plates, so thereafter to be received at the said United States Navy Pay Office, Seattle, Washington, and should ascertain whether or not in fact any merchants other than the said Great Western Smelting and Refining Company, said W. A. Corder Company and the said Fowler Metal Company, had in fact bid therein, and should manipulate and alter and change such bids, if any, that no person, firm or corporation should be awarded the contract to furnish said zinc, other than either the said Great Western Smelting and Refining Company, W. A. Corder Company or Fowler Metal Company, or some

person, firm or corporation acting for and in behalf of either the said Great Western Smelting and Refining Company or said W. A. Corder Company.

That said J. A. Kettlewell should recommend to the Paymaster of the United States Navy Pay Office at Seattle, Washington, and arrange to have accepted the bid and proposal of said Fowler Metal Company so to be offered and filed by the said E. Silverstone, and should arrange to have awarded to said Fowler Metal Company to contract for the furnishing of said zinc, rolled sheet, boiler plates, so to be requisitioned, as aforesaid; that said Edwin F. Meyer should arrange to have said zinc, rolled sheet, boiler plates, which could be forwarded to the United States Navy Yard, Puget Sound, by said Great Western Smelting and Refining Company and said W. A. Corder Company in fulfilment of the Fowler Metal Company contract accepted without question, and said J. A. Kettlewell should recommend and secure the approval of the account as shown by a certain certified bill to be filed, and caused to be filed by said E. Silverstone with the United States Navy Yard, Puget Sound, Washington, purporting to be the certified bill of the Fowler Metal Company, showing delivery of said zinc, rolled sheet, boiler plates, and the acceptance of same at said Navy Yard, Puget Sound, and that none of said zinc, [1258—1205] rolled sheet, boiler plates had been paid for, and should recommend and secure the issuance by the Paymaster at the United States Navy Pay Office at Seattle, Washington, of a check payable to the order of the said Fowler Metal

Company for the amount appearing to be due the said Fowler Metal Company according to the account so to be rendered as aforesaid, and should arrange to have said check delivered to said E. Silverstone or said Emar Goldberg.

And that the object and purpose of said unlawful conspiracy was that said Edwin F. Meyer and said J. A. Kettlewell should so fraudulently exercise said powers, due discretion of their said offices, that there should be no real competition in the bidding for the contract to supply said zinc, rolled sheet, boiler plates, for the use of the United States Navy Yard, Puget Sound, and that the said Great Western Smelting and Refining Company and said W. A. Corder Company, under the name of some one of them, or some other person or corporation for their benefit, would be the only bidders and that the contract to furnish said zinc, rolled sheet, boiler plates, would be obtained by either said Great Western Smelting and Refining Company, W. A. Corder Company or Fowler Metal Company, or by and in the name of some other person or corporation, but secretly for the benefit of said Great Western Smelting and Refining Company and said W. A. Corder Company; and it was further the object and purpose of said unlawful conspiracy, that the United States should pay for said zinc, rolled sheet, boiler plates, a price greatly in excess of its real value, and that said conspirators should obtain for themselves an exorbitant and unreasonable profit in the sale of said zinc, rolled sheet, boiler plates, to the said United States, and it was further the object of said unlawful conspiracy,

that the said person, to wit, Edwin F. Meyer, J. A. [1259—1206] Kettlewell, Emar Goldberg acting for and as the agent and manager of said Great Western Smelting and Refining Company, W. A. Corder, acting for and as the manager of W. A. Corder Company and E. Silverstone, or some of them, should appropriate and convert to their own use such unreasonable profits so fraudulently to be realized from the sale of said zinc, rolled sheet, boiler plates, to the said United States, the proportion in which said unreasonable profits so fraudulently to be realized from the sale of such zinc, rolled sheet, boiler plates, to the United States, should be divided between Edwin Meyer, J. A. Kettlewell, Emar Goldberg, acting for and as the agent and manager of said Great Western Smelting and Refining Company, W. A. Corder, acting for and as the manager of W. A. Corder Company and E. Silverstone, or some of them, being to the grand jurors unknown.

And the grand jurors aforesaid, upon their oaths aforesaid, do further present: That in pursuance of said unlawful conspiracy, combination, confederation and agreement, and to effect the object of the same, the said J. A. Kettlewell, on or about the 1st day of June, 1908, in the Western District of Washington and within the jurisdiction of this court, being such officer and person acting as aforesaid, did then and there deliver and cause to be delivered to the said Emar Goldberg, a *certain signed* by Robert H. Orr, as Paymaster of the United States Navy Pay Office, Seattle, Washington, and drawn on the Seattle National Bank, Seattle, Washington, a United States

Depository for the sum of Seven Thousand Four Hundred and Seventeen and 09/100 Dollars (\$7,417.09), payable to the order of the Fowler Metal Company, which said check was then and there in the words and figures following, to wit: [1260—1207]

	No. 82	U. S. Navy Pay Office.
		Seattle, Washington, May 26th, '08.
United States	The Seattle National Bank, Seattle, Washington.	
Depository.	United States Depository.	
State object		order
for which	Pay to Fowler Metal Co. or bearer	Seventy
drawn.	four hundred and seventeen 09/100 Dollars.	
Zines.1725	\$7417.09/100	ROBERT H. ORR,
		Paymaster, U. S. N.

And the grand jurors aforesaid, upon their oaths aforesaid do further present: That in pursuance of said unlawful conspiracy, combination and agreement, and to effect the object of the same, the said J. A. Kettlewell, on or about the 1st day of June, 1908, in the Western District of Washington and within the jurisdiction of this court, being such officer and person acting as aforesaid, did then and there deliver, and cause to be delivered to the said E. Silverstone, a certain check signed by Robert H. Orr as Paymaster of the United States Navy Pay Office, Seattle, Washington, and drawn on the Seattle National, Seattle, Washington, a United States Depository for the sum of Seven Thousand Four Hundred and Seventeen and 09/100 Dollars (\$7,417.09), payable to the order of the Fowler Metal Company, which said check was then and there in the words and figures following, to wit:

	No. 82	U. S. Navy Pay Office.
		Seattle, Washington, May 26th, '08.
United States	The Seattle National Bank, Seattle, Washington.	
Depository.	United States Depository.	
State object		order
for which	Pay to Fowler Metal Co. or bearer	Seventy
drawn.	four hundred and seventeen 09/100 Dollars.	
Zincs.1725	\$7417.09.	ROBERT H. ORR,
		Paymaster, U. S. N.

[1261—1208]

And the grand jurors aforesaid, upon their oaths aforesaid as further present: That in pursuance of said unlawful conspiracy, combination, confederation and agreement, and to effect the object of the same, the said Emar Goldberg, on or about the 1st day of June, 1908, in the Western District of Washington, and within the jurisdiction of this court, then and there had in his possession a certain obligation and security of the United States, to wit, a certain check drawn by an authorized officer of the United States, to wit: Robert G. Orr, as Paymaster of the United States Navy Pay Office, Seattle, Washington, upon the Seattle National Bank, Seattle, Washington, a United States depository, which said check was in words and figures following, to wit:

	No. 82	U. S. Navy Pay Office.
		Seattle, Washington, May 26th, '08.
United States	The Seattle National Bank, Seattle, Washington.	
Depository.	United States Depository.	
State object		order
for which	Pay to Fowler Metal Co. or bearer	Seventy
drawn.	four hundred and seventeen 09/100 Dollars.	
Zincs.1725	\$7417.09/100	ROBERT H. ORR,
		Paymaster, U. S. N.

and the said Emar Goldberg as having said check in his possession at the time and place aforesaid,

within the Western District of Washington, and within the jurisdiction of this court, did, with fraudulent intent, knowingly write and cause to be written upon the back of said check, a certain endorsement of the following tenor, to wit:

“Pay to the order of E. Silverstone,

FOWLER METAL CO.

pr. E. S. FOWLER,

Tres. & Mgr.” [1262—1209]

And the grand jurors aforesaid, upon their oaths aforesaid, do further present: That in pursuance of said unlawful conspiracy, combination, confederation and agreement, and to effect the object of the same, the said Emar Goldberg, on or about the 1st day of June, 1908, in the Western District of Washington, and within the jurisdiction of this court, then and there had in his possession a certain obligation and security of the United States, to wit, a certain check drawn by an authorized officer of the United States, to wit: Robert H. Orr, as Paymaster of the United States Navy Pay Office, Seattle, Washington, upon the Seattle National Bank, Seattle, Washington, a United States depositary, which said check was in words and figures following, to wit:

No. 82

U. S. Navy Pay Office.

Seattle, Washington, May 26th, '08.

The Seattle National Bank, Seattle, Washington.

United States Depositary.

United States
Depositary.

State object
for which
drawn.

Zines.1725

order

Pay to Fowler Metal Co. or ~~bearer~~ Seventy
four hundred and seventeen 09/100 Dollars.

\$7417.09/100

ROBERT H. ORR,

Paymaster, U. S. N.

And on the back of said check was the following:

“Pay to the order of E. Silverstone,

FOWLER METAL CO.

pr. E. S. FOWLER,

Tres. & Mgr.”

and the said Emar Goldberg as having said check in his possession at the time and place aforesaid, within the Western District of Washington, and within the jurisdiction of this court, with fraudulent intent, did knowingly deliver and cause to be delivered said check to one E. Silverstone. [1263—1210]

And the grand jurors aforesaid, upon their oaths aforesaid, do further present: That in pursuance of said unlawful conspiracy, combination, confederation and agreement, and to effect the object of the same, the said E. Silverstone, on or about the first day of June, 1908, in the Western District of Washington, and within the jurisdiction of this court, then and there had in his possession a certain obligation and security of the United States, to wit, a certain check drawn by an authorized officer of the United States, to wit: Robert H. Orr, as Paymaster of the United States Navy Pay Office, Seattle, Washington, upon the Seattle National Bank, Seattle, Washington, a United States depository, which said check was in words and figures following, to wit:

	No. 82	U. S. Navy Pay Office.
		Seattle, Washington, May 26th, '08.
United States	The Seattle National Bank, Seattle, Washington.	
Depository.	United States Depository.	
State object		order
for which	Pay to Fowler Metal Co. or bearer	Seventy
drawn.	four hundred and seventeen 09/100 Dollars.	
Zines.1725	\$7417.09/100	ROBERT H. ORR,
		Paymaster, U. S. N.

And the said E. Silverstone so having said check in his possession at the time and place aforesaid, within the Western District of Washington, and within the jurisdiction of this court, did write upon the back of said check a certain endorsement of the following tenor to wit: "E. Silverstone."

And the grand jurors aforesaid, upon their oaths aforesaid, do further present: That in pursuance of said unlawful conspiracy, combination, confederation and agreement, and to effect the object of the same, the said E. Silverstone, on or about [1264—1211] the first day of June, 1908, in the Western District of Washington and within the jurisdiction of this court, then and there had in his possession a certain obligation and security of the United States, to wit, a certain check drawn by an authorized officer of the United States, to wit: Robert E. Orr, as Paymaster of the United States Navy Pay Office, Seattle, Washington, upon the Seattle National Bank, Seattle, Washington, a United States depository, which said check was in words and figures following, to wit:

No. 82

U. S. Navy Pay Office.

Seattle, Washington, May 26th, '08.

The Seattle National Bank, Seattle, Washington.

United States Depository.

United States
Depository.

State object
for which
drawn.

Zincs.1725

order

Pay to Fowler Metal Co. or ~~bearer~~ Seventy
four hundred and seventeen 09/100 Dollars.

\$7417.09/100

ROBERT H. ORR,

Paymaster, U. S. N.

And the said E. Silverstone as having said check in his possession at the time and place aforesaid, within the Western District of Washington, and within the jurisdiction of this court, did deposit and cause to be deposited said check in the First National Bank of Seattle, Washington, for the credit of the said E. Silverstone.

And the grand jurors aforesaid, upon their oaths aforesaid, do further present: That in pursuance of said unlawful conspiracy, combination, confederation and agreement, and to effect the object of the same, the said E. Silverstone, on or about the first day of June, 1908, in the Western District of Washington, and within the jurisdiction of this court, did issue and cause to be issued a check drawn on the First National Bank of Seattle, Washington, payable to the order of the Great [1265—1212] Western Smelting and Refining Company, in the sum of Seven Thousand Four Hundred and Seventeen and 09/100 Dollars (\$7,417.09) and signed by himself and delivered, and caused to be delivered said check on said date to one Emar Goldberg.

And the grand jurors aforesaid, upon their oaths aforesaid, do further present: That in pursuance of said unlawful conspiracy, combination, confedera-

tion and agreement, and to effect the object of the same, one Emar Goldberg, on or about the 1st day of June, 1908, in the Western District of Washington, and within the jurisdiction of this court, then and there had in his possession a check issued and signed by E. Silverstone and drawn on the First National Bank of Seattle, Washington, and payable to the order of the Great Western Smelting and Refining Company, in the sum of Seven Thousand Four Hundred and Seventeen and 09/100 Dollars (\$7,-417.09), and so having said check in his possession, did then and there endorse on the back of said check the name of the payee thereof, to wit: Great Western Smelting and Refining Company, and did then and there deposit said check to the credit of the Great Western Smelting and Refining Company in the National Bank of Commerce, Seattle, Washington; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

ELMER E. TODD,

United States Attorney.

CHARLES T. HUTSON,

Assistant United States Attorney.

Witnesses examined before grand jury:

Henry DeF. Mel.

Ezra Fowler.

A. W. Barnes.

E. W. Brownell.

H. E. House.

L. H. Garrodd.

C. A. Philbrick.

George French.

W. P. Showve.

[1266—1213]

Now, considering the charges made in the indictment, you will understand the meaning of the state-

ments made. It is *alleged*, in substance, that the defendant Meyer was principal clerk of the storekeeper of the navy yard, Puget Sound, Washington, and had power in recommending and proposing various kinds of supplies for use in the navy yard and suggesting and fixing the time within which such supplies should be delivered, and in suggesting and devising means for the receipt of requisitioned supplies; that the defendant Kettlewell was Chief Clerk of the United States Navy Pay Office at Seattle, Washington, and among his duties was discretion in suggesting the disposition and disposing of the requisitions for supplies received from the storekeeper of the navy yard and from the Bureau of Supplies and Accounts, Navy Department, Washington, D. C., and in giving notice to the public that competitive proposals and bids would be received by the paymaster of the United States Navy Pay Office at Seattle, Washington, for the purchase of supplies for the storekeeper at the navy yard, and devising ways and means in receiving bids, recommending the awards and awarding contracts to the successful bidder, in suggesting the approval or rejection of accounts rendered to the said paymaster by such successful bidder, to be due him for supplies furnished, and issuing and delivering checks to the successful bidder for the payment of claims for supplies furnished; and

That the defendant Goldberg was manager of the Great Western Smelting and Refining Company of San Francisco, Cal., having offices in various cities, including Seattle, which company was engaged in the

business of buying and selling scrap iron, tin, zinc, brass, copper, and kindred articles; and [1267—1214]

That W. A. Corder was manager of a mercantile business under the firm name of W. A. Corder and Company, and was engaged in the business of buying and selling mercantile supplies; and

That Silverstone was engaged in conducting a hotel in Seattle, known as the Herald.

That it is charged that Meyer, Kettlewell, Goldberg, Corder and Silverstone conspired and confederated with each other to defraud the Government of the United States by a scheme by which requisitions for supplies was to be made, the time fixed to be so short a period that no one could bid upon it except some of the defendants; that the defendants, having advance information, would have the metal ready for delivery, and a higher price obtained and a larger profit realized, and a check issued for the money on the depositary and the funds obtained.

An essential element of the offense charged is the purpose of the defendants to commit an offense against the United States. The indictment charges that the defendants conspired with each other and others to defraud the United States of divers sums of money by means of a certain fraudulent scheme. The statute under which the indictment is filed reads as follows:

“If two or more persons conspire to defraud the United States in any manner or for any purpose, and one or more of such parties do any act

to effect the conspiracy, all of the parties to such conspiracy shall be liable to a penalty which is provided by statute.”

All of the words used in this section convey a meaning which is common to all; there is no technical meaning which can be applied; and, briefly stated,

The indictment charges that the conspiracy described was one to defraud the United States, that is, obtain from the [1268—1215] United States, by means of frauds therein described, sums of money. Under this statute, however, it is not necessary that the United States should have actually suffered pecuniary loss.

The statute under which this indictment is drawn condemns a conspiracy to defraud the United States in any manner. The forms which fraud may take are so various that no exact definition can be given to include all the forms it may assume.

You are instructed that if one represents to another as true that which he knows to be false, and makes the representation in such a way and under such circumstances as to induce a reasonable man to believe the same to be true (and the Government would stand in the same position as a man), and the representation is meant to be acted upon, and the person to whom it is made believes it to be true and acts upon the faith of it and suffers damage thereby, this is fraud.

This brings us to the last element involved in the crime of conspiracy as it is defined in the statute under consideration. That is the overt act, or the element of one or more of the parties to the conspiracy

doing an act to effect its object. At common law it was unnecessary to aver or prove an overt act in furtherance of a conspiracy. The offense was complete when the unlawful agreement was entered into and concluded, although nothing was done in pursuance thereof or to carry it into effect; it was one of the few cases in which the law undertook to punish criminally an unexecuted intent or purpose to commit crime. But under the statute of the United States now under consideration, the doing of some act under the conspiracy is an ingredient of the crime, although the act need not be in itself criminal or [1269—1216] amount to a crime.

To make this statute as clear to you as possible, I will call your attention to its three essential elements. The first element is the act of two or more persons conspiring together; the second is to commit any offense against the United States, in defrauding the Government as charged in the indictment; and the third is what is termed the “overt act,” or the element of one or more such parties doing an act to effect the object of the conspiracy.

With respect to the first element, we find that a conspiracy has been described as a combination of two or more persons, by concerted action, to accomplish a criminal or unlawful purpose, or some purpose not in itself unlawful or criminal, by criminal or unlawful means. The common design is the essence of the charge, and while it is necessary, in order to establish a conspiracy, to prove a combination of two or more persons, by concerted action, to accomplish the criminal or unlawful purposes, it is not

necessary to constitute a conspiracy that two or more persons should meet together and enter into an explicit or formal agreement for an unlawful scheme, or that they should directly, by words or in writing, state what the unlawful scheme was to be, other than the general understanding and the details of the plan or means by which the unlawful combination was to be made effective. It is sufficient, if two or more persons, in any manner or through any contrivance, positively or tacitly come to a mutual understanding to accomplish a common and unlawful design. In other words, where an unlawful end is sought to be effected, and two or more persons, actuated by the [1270—1217] common purpose of accomplishing that end, work together, in any way, in furtherance of the unlawful scheme, every one of said persons becomes a member of the conspiracy, although the part he was to take therein was a subordinate one, or was to be executed at a remote distance from the other conspirators. A combination formed by two or more persons, to effect an unlawful end, is a conspiracy, said persons acting under a common purpose to accomplish the end designed. Any one who, after a conspiracy is formed, and who knows of its existence, joins therein, becomes as much a party thereto from that time as if he had originally conspired. Furthermore, where several persons are proved to be combined together for the same illegal purpose, any act done by one of the parties in pursuance of the original concerted plan and with reference to the common object, is, in the contemplation of the law, the act of the whole party, and therefore the proof

of such act will be evidence against any of the parties who were engaged in the same conspiracy. It is also true that any declaration made by one of the parties during the pendency of the illegal enterprise is not only evidence against himself, but is evidence against the other parties, who, when the combination is proved, are as much responsible for such declarations and the acts to which they relate as if made and committed by themselves. This rule, you will understand, applies to the declaration of a co-conspirator, although he may not be on trial, his declarations being equally admissible with those of one under indictment and prosecution.

The confederacy to commit an offense is the gist of the criminality under the law. The law regards the act of unlawful combination and confederation as dangerous to the peace of [1271—1218] society and declares that such combination and confederacy of two or more persons to commit crime, requires an additional restraint to those provided to commit an offense.

In considering the question as to the existence or nonexistence of a conspiracy as charged in the indictment, and the further question as to whether the defendants on trial were connected therewith, in case you find from the evidence such a conspiracy has existed, you will consider all of the facts and circumstances shown by the evidence which tend to show or have any bearing upon the facts as to whether the defendant, or either of them, did confederate and conspire together and therewith show the condition of the mind of the defendant, Meyer, Goldberg, Ket-

tlewel and Corder, and their intent, if any such is shown. In this connection, you are instructed that "a conspiracy in itself necessarily involves the state of mind of the conspirators."

"If one be a conspirator to accomplish an unlawful act, or a lawful act in an unlawful manner, obviously his state of mind involves his purpose, scheme of self-aggrandizement and the like."

It is essential "in both cases, to show the state of mind of one who is alleged to be a conspirator," as bearing upon the question of the condition of the defendants' mind at the time of the alleged acts relied upon in this case, as showing the existence or non-existence of a conspiracy. [1272—1219]

This, of course, cannot be shown by positive testimony, except by the confession of one of the parties to the conspiracy. It is for you to determine from all of the facts and circumstances detailed by the witnesses and disclosed by the records offered and admitted as evidence in this case together with the testimony of Kettlewell, one of the parties charged in this indictment, the state of mind and intent and purpose of the defendants, that if you find they, or any two of them, had any, in forming a combination or conspiracy, if you find one was formed.

You are instructed that every man is presumed to intend the natural and probable consequences of his voluntary acts; and if you should find that such a conspiracy as alleged in the indictment, having for its object or purpose some one or more of the objects and purposes enumerated in the indictment, existed, and that any one of the conspirators, during the life

of such conspiracy, in pursuance of such conspiracy, and to effect the object thereof, set in motion any agency or power which would naturally result in the performance of any one of the overt acts charged in the indictment, and the performance of such act in fact result therefrom, and was so performed during the life of such conspiracy and to effect the object and purpose of such conspiracy, then you are instructed that such defendants intended the natural consequences, and such act would in law be the act of all of the co-conspirators irrespective of which member of the conspiracy set in motion such agency or power or performed such overt act. If you find a conspiracy was entered into between two or more of the defendants charged in the indictment, and that defendant Goldberg was a member of such conspiracy [1273—1220] and that Goldberg, in furtherance of such conspiracy, obtained Silverstone's endorsement on that certain check set out in the indictment and issued to the Fowler Metal Company and cashed the same at the bank, and by reason of such act the defendant Goldberg or his company, the Great Western Smelting and Refining Company, secured the money, such act on the part of Goldberg would be the act of all of the persons who entered such conspiracy, and would be an overt act to effect the object of the conspiracy, if you find beyond a reasonable doubt that a conspiracy was entered into as charged.

It is not essential to constitute the offense of conspiracy that each of the conspirators had knowledge of all of the details of the conspiracy, or of all of the means by which the conspiracy was to be accom-

plished; if there was a common purpose and intent to defraud the United States by the general means set forth in the indictment with a mutual co-operation between the parties to the conspiracy to accomplish such object and one of the conspirators did one of the overt acts charged in the indictment to effect the object of the conspiracy, then all of the members of the confederation or conspiracy would be guilty, even though they did not have knowledge of all of the acts committed by their co-conspirators in the consummation of the object of the conspiracy. A conspiracy has sometimes been compared to a kind of partnership. In a partnership for an unlawful purpose, as in a partnership for a lawful purpose, each one, while acting within the scope of the partnership agreement, is acting for all the partners. The rule is all for each and each for all. But there is some distinctions between a conspiracy partnership and an ordinary business partnership. For instance, a partnership in business usually implies that the profits are to be [1274—1221] divided between the partners; while, if a conspiracy exists, in every other respect, a person might be a party to a conspiracy who did not himself receive a part of the profits as a result of such unlawful confederation. And again, in a business partnership, if one of the partners should drop out by death, or otherwise, the whole partnership is dissolved; but in a conspiracy one might drop out and the conspiracy still remain alive as to the others.

Every conspirator is liable for the overt acts illegally committed in pursuance of the conspiracy,

whether they were active participants or not. Nor is it necessary that the time that the acts are charged to have been done should be proven exactly as alleged. It would be sufficient if they were within three years before the return of the indictment, so far as the consummated act is concerned. You are instructed that if you should find from the evidence in this case that a conspiracy was entered into between two or more of the defendants in this case on or about the 1st day of April, 1908, or at a time prior thereto, and that such confederation or combination and conspiracy continued until the consummation of the acts set out to be done, and it was finally consummated on the 1st day of June, 1908, then you are instructed that the defendants could be found guilty of a conspiracy to defraud, even though the conspiracy was formed more than three years preceding the filing of the indictment. If you find that the overt act which consummated the design of the conspiracy was performed on the 1st day of June, 1908, which was within three years from the time of the returning of this indictment which was on the 31st day of May, 1911. You are further instructed that the presentation of a check from [1275—1222] the paymaster of the U. S. Navy to the bank where the United States funds were on deposit would be an overt act in consummation of a scheme to secure money belonging to the United States. If you should find a conspiracy was entered into as charged in the indictment, and that a check was issued in pursuance to and by reason of such conspiracy, and that such check was endorsed by one of such conspirators, and

the money obtained as alleged in the indictment on the 1st day of June, 1908, then such conspiracy would not be consummated until June 1st, 1908, and all other parties to the conspiracy would be guilty, whether they actually in person participated in the overt act or not.

Whether a conspiracy was entered into or not in this case, between the defendants, or any of them, is a question of fact for you to determine, subject to such rules as may be given you in these instructions to assist you in arriving at a correct conclusion. The evidence on this point is largely circumstantial, except the testimony of the defendant Kettlewell, who testified to the entering into of a conspiracy between himself, the defendant Goldberg and the defendant Meyer, and also involves a consideration of the acts of the several defendants with relation to the acts charged and the course of dealing with each other during the time charged in the indictment, and generally their attitude with relation to the matters charged in this indictment. There are matters for your consideration, together with all of the facts and circumstances as detailed by the witnesses and shown by the exhibits, subject to these instructions.

[1276—1223]

Testimony was permitted to go before you showing the business relations between the Great Western Smelting & Refining Company, of which the defendant Goldberg was local manager at Seattle, having charge of its affairs, and the W. A. Corder Company, of which the defendant Corder was the managing hand, and also with relation to some of the other de-

fendants, and also bids submitted by Goldberg and Corder for their respective companies, as competitors when they were in fact not competitors. This was permitted to go before you for the purpose of surrounding you with the course of dealing of these defendants and placing before your minds as nearly as may be possible all of the facts and circumstances pertaining and relating to the business conduct of the defendants with each other and towards the Government, not as a wrong within itself, but as an element which might throw some light upon the issues in this case. Such evidence, however, cannot be considered against defendant Meyer unless you find beyond a reasonable doubt that a conspiracy was entered into, and to which defendant Meyer was a party.

The Government of the United States is entitled, the same as an individual, to purchase materials or supplies desired at fair and reasonable prices, in the open market on competitive bids, and where it publicly submits proposals for competitive bids to furnish materials or supplies, it is entitled, the same as an individual, to fair and open competition among bidders for the supplying of the same. Hence any collusion, combination, or agreement between a prospective bidder and an employee or employees of the United States, having in charge the preparation of requisitions, or the issuance of proposals for such materials or supplies, to prevent such fair, reasonable and open competition, thereby causing the United States, at the [1277—1224] time and under the circumstances surrounding the purchase, to

pay a price, or prices, in excess of the fair and reasonable market value of the materials and supplies so purchased, and to pay prices in excess of those for which such materials and supplies could have been purchased as the result of competitive bids, would to that extent defraud the United States. Therefore, any act of any one or more of such persons performed during the life of such conspiracy, if you find a conspiracy was formed, and to effect the object of such conspiracy, whether with or without the intent on the part of such conspirator, or some of them, to personally profit thereby at the expense of the United States, for which such member of such conspiracy would be liable.

You are further instructed that merchants, manufacturers and dealers in materials or supplies have a legal right to bid for the supplying of materials to the Government at such prices as they see fit, whether such prices is exorbitant or otherwise, and have the right to obtain by fair means any prices demanded, provided, however, that such dealers or persons so bidding would not have the right by such fraudulent means as charged in the indictment to obtain exorbitant prices.

You are instructed that when a duty is devolved by statute or departmental regulation upon an officer of the United States Navy, or upon a board of officers, the performance of which involves the exercise by such officer, board of officers, or discretion or judgment, then the official act or duty resulting from the exercise of such discretion is final and conclusive unless it is reversed or superseded by some superior

officer or [1278—1225] board, and that the finality of such action would not depend upon the degree of wisdom or skill which may have accompanied the exercise of such discretion.

In this case testimony has been offered bearing upon the usual custom following in the office of the Storekeeper of the navy yard, and also the Navy Pay Office in the city of Seattle. This was admitted for the purpose of surrounding you with all the circumstances and environment of the offices of the General Storekeeper and of the Navy Pay Office in Seattle, thus giving you the benefit of such information in weighing the testimony and analyzing the acts of the defendants, and to be considered by you together with all other surrounding facts and circumstances, which testimony has been given relating to the conduct of the defendants charged in the indictment, and has not been admitted as a justification or excuse of conduct in this case, if you should find from the evidence beyond a reasonable doubt that the defendants or any two of them, did conspire as charged in the indictment for the purpose of defrauding the Government of public funds as charged in this indictment.

And in this connection you are instructed that any official act done or duty performed by the defendant Meyer in relation to the purchase of supplies and material to be used by the United States Navy, or in reference to the preparation of requisitions therefor in discharge of his duties or employment as clerk in the Storekeeper's Office at the Puget Sound Navy Yard, which were done or performed in good faith,

cannot be considered as evidence connecting him with any unlawful conspiracy, regardless whether in fact good or bad judgment was exercised by him. [1279—1226]

You are instructed that it is proper and necessary that bidders for furnishing of materials or supplies to the United States Navy shall be duly informed by the official soliciting bids as to the nature, quality and quantity of the articles to be purchased, and that certain officers of the Navy Department are authorized to accept such bids and award such contracts without advertising; and that rules requiring that contracts for Government supplies must be founded on advertising do not apply to all cases, and do not apply where an emergency or exigency demand immediate action; and whether such emergency exists is a matter to be determined by the proper Government officers. Evidence upon this phase of the matter has been produced before you, and it is for your consideration, together with all the other circumstances and facts developed upon the trial, and should be taken into account in your arriving at your conclusions as to whether or not the charges made in the indictment have been sustained.

You are instructed, that when bids are invited any person may bid to furnish such supplies, but no person shall be received as a contractor who is not a manufacturer or a regular dealer in the articles which he offers to supply; nor shall one party offer more than one bid, either in his own name, or in the name of his clerk, partner, or any other person, and if he does, such bids may be rejected. And if you should

find it to be a fact that more than one bid was offered by either one of the defendants in his own or its own name,— I mean by that the name of his company,— and also in the names of his, its, or their clerk, partner, or subsidiary concern or corporation, that does not of itself constitute a crime. Such act would give the Bureau [1280—1227] of the Navy Yard Department the discretion to reject *and* all such bids.

As stated to you, the defendant Emar Goldberg and the defendant W. A. Corder could offer bids to supply the Navy Department with the articles referred to in the indictment in their own name, and also in the name of subsidiary corporations or companies and would not, so far as this action is concerned, violate any act of Congress. They did, however, assume the risk of having all or any of such bids rejected. The fact they were interested together in bids submitted, and the fact that Goldberg requested or had a bid put in by the name of Fowler Metal Company, which was a subsidiary of the Great Western Smelting & Refining Company, would not of itself constitute an offense. These are simply elements which you may consider, not for the purpose of determining whether the defendants Goldberg and Corder committed separate offenses in submitting such bids, or were guilty of irregular conduct by such actions, but to be considered by you as an element or circumstances together with all of the other circumstances and elements which have been developed upon the trial of this cause, together with the testimony of J. A. Kettlewell, as to whether the defendants did enter into a conspiracy in this case as charged in the indictment,

or joined in such conspiracy after the original confederation and conspiracy had been formed, if you find one was formed.

You are instructed, however, that such facts and circumstances between Goldberg and Kettlewell cannot be considered as evidence against the defendant Meyer unless you find from other circumstances and facts in the case, together with the testimony of the defendant Kettlewell, that a conspiracy was [1281—1228] entered into by the defendants Goldberg, Meyer, and Corder with each other, or with either one or more of the defendants and Kettlewell.

You are further instructed that so far as the defendant Meyer is concerned, and Kettlewell, who is charged in this indictment and against whom it has been discontinued, their official duties by the testimony necessarily involved the performance by them of certain acts pertaining to the preparation of requisitions and the issuance of proposals for the purchase of zinc, the articles charged in the indictment by the Government, and so far as the defendants Goldberg and Corder are concerned, they had each the right on behalf of their respective companies, by fair and honest means, to sell and deliver to the Government zinc, as well as other materials at *bona fide* obtainable prices. You should therefore distinguish between *bona fide* acts and criminal conduct, as any *bona fide* act so performed by the defendants Meyer, Goldberg and Corder in the discharge of their official and representative duties, if you find they performed any, would not constitute either a conspiracy or an act to effect the object of a conspiracy, nor would the fact

that the defendants Goldberg and Corder bid upon or tendered a bid to furnish zinc, as stated, and without any intent to defraud, constitute either a conspiracy or an act to effect the object of the conspiracy charged; but if you should find that the several acts, or any thereof, performed by the several defendants, or any of them, pertaining to the purchase by the United States of the zinc metal plates set out in the indictment were done in pursuance of a conspiracy, and during the life thereof, and to effect some one or more of the objects of such conspiracy, then such act or acts would not be *bona fide*, but would constitute an act or acts [1282—1229] performed in pursuance of such criminal conspiracy or to effect some object thereof, and all of the parties to the conspiracy would be equally liable.

You are instructed that several wrongs never make a right, and if you believe from the evidence presented in this case that a wrong has been committed against the Government in other cases, as disclosed by the evidence in this case, and that it did not receive fair treatment at the hands of bidders and officials, such fact would not be an excuse for releasing the defendants in this case, if you believe beyond a reasonable doubt from the testimony in this case that they did conspire as charged for the purpose of defrauding the Government, nor would such fact, if you have a reasonable doubt as to the truth, justify you in finding the defendants guilty in this case because of such prior irregularity, unless you believed beyond a reasonable doubt from the testimony that they were guilty of the offense as charged in this in-

dictment. Nor, would the fact, if you believe it to be true that any of the defendants supplied zincs to the Government at prices which you may deem too high, be sufficient upon which to predicate a verdict of guilty, unless the evidence in this case convinces you beyond all reasonable doubt that such prices were fixed in pursuance of the conspiracy, set out in the indictment on trial before you.

You are further instructed that if you find beyond a reasonable doubt that a conspiracy was entered into between two of the defendants on trial in this case, or by one or both of the defendants and J. A. Kettlewell, at about the time charged in the indictment, and there is no evidence before the Court that [1283—1230] the defendant Corder entered into such a conspiracy prior to the awarding of the bid in issue in this case on or before the 15th day of April, 1908, but if you should find from the evidence in this case, beyond a reasonable doubt, that after the awarding of such bid to the Fowler Metal Company that defendant Corder joined such conspiracy, if you find beyond a reasonable doubt was entered into prior to that time, with full knowledge of the purpose and intent of such conspiracy, and continued to co-operate in such conspiracy and participate in the profits, then the defendant Corder would be guilty of conspiracy as charged in the indictment whether he did an overt act in furtherance of such conspiracy prior to the 1st day of June, 1908, by cashing the check given by the Government in payment for the zinc referred to in the indictment.

In determining whether any of the defendants

joined the conspiracy, if there was one, after its formation, you will not consider any act occurring subsequent to the first of June, 1908, the date of the accomplishment of the conspiracy, if one was entered into.

Evidence in this case has been permitted to go before you of the existence of the business relations between the defendant Corder and the Great Western Smelting & Refining Company, of which the defendant Goldberg was manager, which business relations contemplated the handling together or in common of zinc plates such as is described in the indictment. The testimony has been further admitted to show of the payment of certain moneys by Corder to the Great Western Smelting & Refining Company, and certain other payments of the Great Western Smelting & Refining Company to Corder and certain [1284—1231] transactions between these parties, prior to and during the time charged in the indictment. This has not been permitted to go before you, gentlemen of the jury, as an offense for which these gentlemen are on trial in this case, but was permitted only for the purpose of surrounding you with as many of the facts and circumstances with relation to these men and their dealings with each other, and to be considered with the other facts which are in evidence in this case in your deliberations upon the testimony as to whether there was a conspiracy and a confederation entered into by these men and others as alleged in the indictment. These defendants are not on trial for any unlawful act other than that charged in the indictment. If you find that the only relation

the defendant Corder had in the matter charged was the fact that he was an owner in common with the Great Western Smelting & Refining Company in the zinc that was sold to the navy yard and received one-half of the proceeds of the sale, but that he did not enter into a conspiracy with the other defendants, or either of them, nor join the conspiracy after one was formed between Kettlewell, Meyer and Goldberg, if you find one was formed, under such circumstances your verdict as to Corder should not be guilty, even though you should find that Meyer and Goldberg are guilty as charged.

Evidence was also permitted to go before you of the extent and nature of former sales made by the Great Western Smelting & Refining Company to the Government, and also sales made of zinc and material such as described in the indictment to the Government, and also sales made by the Great Western Smelting & Refining Company to other persons of like material, and zinc for some period prior to the 1st day of April, and also during [1285—1232] the period specifically covered by this indictment. This was not permitted, gentlemen of the jury, for the purpose of showing to you that there was any irregularity in the dealings between the Great Western Smelting & Refining Company and the Government prior to the time charged in the indictment, and is not to be considered by you for any such purpose, even though you might find from the testimony in this case that greater favoritism had been shown to persons other than the Government dealing with this company than to the Government; nor should you

consider it for the purpose of predicating any verdict upon it in this case, if you should find from the evidence that wrong had been done in the carrying out of some of the transactions covered by the testimony except as outlined in these instructions. That testimony was only received by the court and can only be considered by you as an element together with the other evidence in this case for establishing the price at which like metals described in the indictment were sold within this district and at the time and place in issue in this case, in determining the question as to whether a conspiracy existed between the parties, or any of them, charged in this indictment as alleged, for the purpose of defrauding the Government.

You are instructed, that certain evidence was permitted to go before you with relation to an account upon the books of the Great Western Smelting & Refining Company, known as bonus account. This testimony was permitted to go before you, as stated, with relation to these other items in these instructions, for the purpose of endeavoring to surround you, as nearly as possible, with all of the facts and circumstances and environment of the men named in this indictment and the transaction [1286—1233] which was alleged to have been wrong, so as to enable you to consider all of the evidence and circumstances which have been presented in this case which have any bearing upon this transaction, and which would throw any light upon the conduct of the men, so as to enable you to consider, and conclude as to the right in this case and place the fault, if any lies, where it belongs. In considering this account, you are not

permitted to consider this for the purpose of deciding whether the defendant Goldberg, or any of the defendants, committed a completed wrong in any of these items or charges made on this book, except as you may find they have relation to the offense charged in this indictment on trial here, or any of the expenditures which might be deduced from the accounts unexplained; that is to say, if you should find from the examination of this account that this account was started for a wrongful purpose and was used for a wrongful purpose, you cannot find the defendant Goldberg guilty of any wrong which you might find was done by reason of that account contributing to the culmination of any other offense or irregularity having no reference to the offense here charged.

That was only put in evidence to be considered by you as a circumstance together with all the other facts and circumstances which the testimony has shown to exist. And in considering the purpose for which the account was created you will consider the defendant Goldberg's testimony with relation thereto, and the reasonableness of his story and all other facts in evidence bearing upon that point, together with every other fact and circumstance as detailed by the testimony in this case, including the testimony of J. A. Kettlewell. [1287—1234]

You are further instructed that while this indictment has been returned against Edwin F. Meyer, Emar Goldberg, W. A. Corder, J. A. Kettlewell and E. Silverstone, that the indictment has been dismissed as against Kettlewell and Silverstone, and that only Meyer, Goldberg and Corder are on trial

in this case. The fact that this indictment has been dismissed as against Kettlewell and Silverstone does not affect the other defendants in this case, and they will be amenable to the law if you are satisfied beyond a reasonable doubt that these defendants, or any two of them, conspired or confederated together or with each other or with Kettlewell to defraud the United States in the manner and form as charged in the indictment. If you should find beyond a reasonable doubt that a conspiracy was formed and that in pursuance of such conspiracy one or more of the defendants committed the overt acts mentioned in the indictment, all of the defendants as has been stated to you, would be guilty of such conspiracy.

You are instructed that you cannot find the defendants, or either of them, guilty merely upon probabilities, but your conclusion must be arrived at upon direct testimony, or the proof of such facts or circumstances and concurring conduct of the defendants, or either of them, taken in connection with the direct testimony, which shows a co-operation or collusive association with each other to prove beyond a reasonable doubt that the defendants, or either of them, did conspire with each other, or with one Kettlewell as charged in the indictment. And if you should find from the evidence in this case that any of the defendants named in the indictment herein did in fact combine, confederate and conspire together to defraud the United States in [1288—1235] the manner and by the means set out in the indictment; and that any one or more of said defendants committed an overt act as charged for the purpose as

stated in furtherance of the conspiracy charged, then you should return a verdict of guilty against each of the defendants as you find did so conspire; but if there is a reasonable doubt in your minds as to whether either of said defendants, Edwin F. Meyer, Emar Goldberg or W. A. Corder, then you should return a verdict of not guilty against such of the defendants upon whom a reasonable doubt is predicated in your mind.

You are instructed that an accomplice in the commission of a crime is a competent witness, and the Government has the right to use his testimony in the prosecution for commission of an offense. As to whether the testimony of an accomplice is true or false is a question of fact which like any other controverted question of fact, is submitted solely to you to determine for yourselves. An accomplice is one who is associated with another in the commission of a crime, and is regarded under the law as a principal. The witness Kettlewell, who testified in this case, is what the law calls an accomplice. The testimony of an accomplice comes from a polluted source, and while the rule of law is that a defendant can be convicted on the uncorroborated testimony of an accomplice where the honest judgment of the jurors is satisfied beyond a reasonable doubt, still you should act upon such testimony with great care and caution and subject it to careful examination in the light of other evidence in the case, and you should not convict upon such testimony alone, unless you are satisfied beyond all reasonable doubt of its sufficiency and truth.

If the jurors are not satisfied beyond a reasonable doubt of the truth of the confession and require corroboration of the testimony from other facts and circumstances detailed by the testimony, you are instructed that such corroboration must be upon some material fact connecting the defendants, or some of them, with the commission of the offense, and it would not be sufficient if it merely shows the offense was committed and the circumstances thereof without connecting the defendant, or some of them, with such offense.

In considering Kettlewell's testimony you will take into consideration every fact and circumstance connected with his testimony and analyze each circumstance as detailed by the witnesses with the statement and with each other, and from all of these circumstances and the relation of the parties, their conduct towards each other as disclosed by the testimony, and from all these determine where the truth in this case lies.

Certain evidence has been introduced in this case with relation to certain transactions that are claimed to have taken place with relation to the charges made in the indictment on the 11th day of April, the 15th day of April, and the 30th day of May, 1908. You are instructed, gentlemen, that for the purpose of assisting you in analyzing the testimony with relation to these transactions I have been requested while this evidence was being received, to instruct you the day of the week upon which these several dates occur. You are instructed that the 9th of April, 1908, was Thursday, the 11th day of April, Saturday, and the

15th day of April, Wednesday, and the 30th day of May was Saturday. [1290—1237]

If you find, beyond a reasonable doubt, the facts to be established as charged in the indictment you may find all of the defendants guilty, or you may find the defendant Meyer and Goldberg guilty and find Corder not guilty, or you may find the defendant Goldberg guilty and find the defendants Meyer and Corder not guilty, but to do so you must be convinced beyond a reasonable doubt that the defendant Goldberg and Kettlewell conspired for the purpose of defrauding the Government as charged in the indictment, and have a reasonable doubt as to whether the defendants Meyer and Corder were parties to such conspiracy; or you may find the defendant Goldberg and Corder not guilty and find the defendant Meyer guilty, if you believe beyond a reasonable doubt that the defendants Meyer and Kettlewell entered into a conspiracy as charged in the indictment, and have a reasonable doubt as to whether the defendants Goldberg and Corder entered into such a conspiracy or became parties thereto after a conspiracy was formed, if you find one was formed. You cannot find the defendant Corder guilty unless you find the defendant Goldberg guilty because if Corder entered into such conspiracy, if you find one was formed, it was through the defendant Goldberg who must have been a party thereto.

You are instructed, gentlemen of the jury, that no inference of guilty shall attach to the defendant Corder because he did not take the stand and testify in his own behalf. He was within his legal rights

and the law gives him that privilege, and because he didn't take the stand you shall not count that against him and convict him because of that, but simply find him guilty, if you do find him guilty, upon the evidence which [1291—1238] was offered and admitted, and the circumstances as detailed by the witnesses upon the witness-stand.

Some evidence relating to the honesty and integrity of the defendants Goldberg, Corder and Meyer in the community in which they reside has been introduced in this case. The law permits that class of evidence to be received. It is an exception to the rule which generally excludes hearsay testimony. The theory of the law is that if a man has so lived in the community as to have acquired a reputation for honesty and integrity, the presumption is that he is entitled to it; that is, the presumption is that he is honest, or else he would not have such a reputation, and that is allowed to be introduced. General reputation in the community where a person resides is what people say of him, or what people think of him in that community with relation to his probity, honesty and integrity in dealing with people. The value of such evidence is necessarily dependent upon the opportunity of the witnesses for knowing about the opinion of the people generally in that community with relation to such honesty, and is not determined by what one individual may think from his own dealings with a party; and when you consider any evidence relating to a man who has borne a good reputation for honesty and integrity you are to remember the fact, that he

has borne that reputation, and consider that in determining whether the charge against him is true. “Good character is a fact, like all other facts proven in a case, to be weighed and estimated by the jury, and is especially proper to be shown in a case depending upon circumstantial evidence. In a doubtful case it may turn the scale in favor of the accused. It must not be allowed, however, to confuse [1292—1239] the other testimony in the case, and cannot justify an acquittal where the evidence of guilty is clear and convincing.

In considering the testimony offered in behalf of the reputation of the defendants for honesty and integrity, you will take into consideration the scope of the knowledge of the several witnesses who have testified in that regard, and give it such weight and such credence as you deem the testimony is entitled, taking into account the opportunity of the witness for knowing about such reputation, and if such testimony is sufficient to raise a reasonable doubt in your mind as to whether the defendants, or either of them, did commit the offense charged in the indictment, then you should find them not guilty. But if you are convinced beyond a doubt from all the evidence in the case of the guilt of the defendants, then it is immaterial as to what the reputation was at any other time as to the honesty or integrity, and you should return a verdict of guilty as charged.

In deliberating upon this case, gentlemen of the jury, you will take into consideration every circumstance as detailed by the witnesses upon the witness-stand where these parties have had dealings

with each other, or where they have relation to the issue here, analyze it, and compare them with each other, with the conduct of the men with relation to each other, and with relation to these several circumstances as detailed by the witnesses upon the witness-stand, and from all of these facts taken together with the testimony of the witness Kettlewell, determine where the truth in this case lies; and if you should have a reasonable doubt in your mind as to whether the defendants in this case, or either of them, is guilty of the offense charged [1293—1240] then you should return a verdict of not guilty against such defendants as you will have a reasonable doubt as to his guilt; but if you are convinced beyond a reasonable doubt, from all of these facts and circumstances and the testimony which has been offered and admitted, then it will be your duty to return a verdict of guilty against such defendants against whom you have no reasonable doubt.

You are instructed, gentlemen of the jury, that while the Government must prove the defendants guilty beyond every reasonable doubt such proof need not be made by direct and positive testimony, but may be established by circumstantial evidence concerning the defendants and the transactions charged in the indictment concerning which testimony was received. Circumstantial evidence is legal and competent in a criminal case, and when it is of such a character as to exclude every reasonable hypothesis other than that the defendant is guilty, it is entitled to the same weight as direct evidence. You are instructed that what is meant

by circumstantial evidence in criminal cases is proof of such facts and circumstances connected with and surrounding the commission of the crime charged as tends to show the guilt or innocence of the party charged; and if these facts and circumstances are sufficient to satisfy you of the guilt of the defendants, or either of them, beyond a reasonable doubt, then such evidence is sufficient to authorize a conviction. No general rule can be given as to the quantity of circumstantial evidence which in any case shall be deemed sufficient. All of the circumstances proved must be consistent with each other, consistent with the hypothesis that the accused is guilty, and at the same time inconsistent with the hypothesis that he is innocent, and with [1294—1241] every other reasonable conclusion except that of guilt.

You are instructed, gentlemen of the jury, that a reasonable doubt for a trial juror is such a doubt as a man of ordinary prudence, sensibility and decision, in determining an issue of like concern to himself as that before the jury to the defendant, would allow it to have any influence upon him, or make him pause or hesitate in arriving at his determination; but such a doubt should be ascertained only from the want of such evidence to satisfy you beyond a reasonable doubt, or a doubt which is raised by the evidence itself, and should not be merely speculative, imaginary, or conjectural. A juror is satisfied beyond a reasonable doubt if, from a candid consideration of the entire evidence which has been offered and admitted, direct and circumstantial, he has an

abiding conviction of the truth of the charge made.

You gentlemen of the jury, are the sole judges of the facts in this case. You must determine what they are. If I have referred to any facts in this case, either in these instructions or during the course of the trial of this case, it has not been done with a view of indicating any opinion that I may have of any single fact, but simply to illustrate some proposition of law which is involved with defendants. You are to take the law, however, from the Court. You are the sole judges of the facts, and you must determine what they are. You are likewise the sole judges of the credibility of the witnesses who have testified before you, and in determining the weight or credit you desire to attach to the testimony of any witness, you will take into consideration the demeanor of the witness upon the witness-stand, the reasonableness of [1295—1242] the story of the several witnesses who have testified before you, the opportunity of the witnesses for knowing the things about which they have testified, the bias or lack of interest of the several witnesses who have testified before you, and from all of these facts and circumstances, determine where the truth in this case lies. You will apply to each witness who has testified before you the same test that you would apply to any witness or to any other person in the ordinary affairs of life, whose truthfulness or falsity may be under consideration by you, and from all of these determine whether any witness has wilfully testified falsely, or the weights that should be given to the testimony which has been offered here.

If you find from the testimony in this case that any witness has wilfully testified falsely concerning any material matter or fact in this case you would have the right to disregard his entire testimony, except in so far as you may find it corroborated by other credible evidence or circumstances developed or detailed upon the trial of this case.

You will deliberate upon this case as twelve honest men and give it the same consideration as you would want twelve men to give a matter in which you were concerned either as a defendant or as the Government of the United States, and give it that consideration which it should have, and exercise and discharge that conscientious, honest judgment which will leave an abiding conviction with you that you have discharged your full duty.

You will take into consideration all of the evidence that has been offered and admitted, and exhibits which you will [1296—1243] take with you to the jury-room; except two exhibits will not be sent with you to the jury-room, that is, exhibit No. 58 and No. 11; those will not be sent to the jury-room with you.

I would likewise suggest to you, gentlemen of the jury, you disregard the statements of counsel made to each other in the course of the trial or during the argument of this case where the statements are not supported by the testimony; and determine this case solely upon the evidence which has been offered and admitted.

The indictment will be sent with you to the jury-

room, but you are not to consider that as evidence in the case.

Immediately upon retiring to the jury-room you will elect one of your number as foreman, and when you have agreed upon a verdict, you will cause the verdict to be signed by your foreman and report to the Court.

I will submit you five forms of verdict. If you are convinced beyond a reasonable doubt that all of the defendants are guilty, and that all of the allegations in the indictment have been sustained, then the following will be your verdict:

After the caption, "We, the jury in the above-entitled cause, find Edwin F. Meyer, Emar Goldberg and W. A. Corder guilty as charged in the indictment."

If you have a reasonable doubt as to the guilt of all of the defendants, then you will return the following verdict:

"We, the jury in the above-entitled cause, find Edwin F. Meyer, Emar Goldberg and W. A. Corder not guilty." [1297—1244]

If you find that some of the defendants are guilty and some are not guilty, then the following will be your verdict, if you have a reasonable doubt as to the guilt of the defendant Meyer, then this is your verdict:

"We, the jury in the above-entitled cause, find the defendant Emar Goldberg ——" then you will write in the word "Not"—"not guilty," and if you find he is guilty and some of the other defendants not guilty, you will write in the word "is" guilty.

If you find the defendant Goldberg not guilty under the instructions, and find some of the other defendants guilty, this will be your form of verdict:

“We, the jury in the above-entitled cause, find the defendant Emar Goldberg ——” you will write the word “not” in the blank so it will read “not guilty”; and if you should find that he is guilty and some of the other defendants are not guilty, you will write in there “is” guilty.

And if you should find that the defendant Corder is not guilty and some of the other defendants are guilty, then this will be your verdict—unless you find the defendant Goldberg guilty you cannot find the defendant Corder guilty, so if you find the defendant Corder guilty under these instructions you will write in the word “is” in here, and if not guilty write in the word “not” and return the form and report to the Court.

I called you back, gentlemen of the jury, because I omitted to give you one instruction that was requested. I overlooked it, and it is this: I want to instruct you the mere fact that Emar Goldberg loaned money to J. A. Kettlewell at his request and without security would not be sufficient to warrant a verdict of guilty against Goldberg, the fact of the loaning of money of itself, if you find that to be a fact. You [1298—1245] will consider this with all of the other instructions I have given you. You may retire.

INSTRUCTIONS REQUESTED BY DEFENDANTS AND REFUSED.

The defendants requested certain instructions be-

fore the argument and in due time the defendants Edwin F. Meyer and Emar Goldberg requested the Court to give to the jury certain instructions as follows, to wit:

I advise your returning a verdict of not guilty as to the defendant Emar Goldberg, as the evidence introduced by the Government is insufficient to warrant a verdict of guilty.

The Court refused to give said instruction and the defendants Edwin F. Meyer and Emar Goldberg, before the retirement of the jury and within the time allowed by law and the rules of the Court, duly excepted to such refusal.

I advise you to return a verdict of not guilty as to Emar Goldberg as the evidence conclusively shows that the last overt act occurred more than three years before the filing of the indictment herein.

The Court refused to give said instruction and the defendants Edwin F. Meyer and Emar Goldberg, before the retirement of the jury and within the time allowed by law and the rules of the Court, duly excepted to such refusal.

I charge you to return a verdict of not guilty as to the defendant Emar Goldberg for the reason that the alleged violation [1299—1246] of section 5440 (Revised Statutes of United States) was committed and completed on the 26th day of May, 1908, and the indictment in this case was not presented until the 31st day of May, 1911.

The Court refused to give said instruction and the defendants Edwin F. Meyer and Emar Goldberg, before the retirement of the jury and within the time

allowed by law and the rules of the Court, duly excepted to such refusal.

I charge you to return a verdict of not guilty as to the defendant Emar Goldberg, as the undisputed facts show that no overt act to effect the objects of the alleged conspiracy occurred within the period limited by section 1044 (Revised Statutes of United States).

The Court refused to give said instruction and the defendants Edwin F. Meyer and Emar Goldberg, before the retirement of the jury and within the time allowed by law and the rules of the Court, duly excepted to such refusal.

I charge you that the alleged defense in this case was ended on the date of delivery of the check in question, to wit, on the 26th day of May, 1908, and was barred by the statute of limitation on the 26th day of May, 1911.

The Court refused to give said instruction and the defendants Edwin F. Meyer and Emar Goldberg, before the retirement of the jury and within the time allowed by law and the rules of the Court, duly excepted to such refusal. [1300—1247]

I charge you before you can return a verdict of guilty you must find that an overt act occurred within three years of the filing of the indictment herein.

In this connection, I charge you that an overt act is an act done to effect the objects of the conspiracy; settlements between the alleged conspirators or with agents for profits, are not overt acts.

The Court refused to give said instruction and the

defendants Edwin F. Meyer and Emar Goldberg, before the retirement of the jury and within the time allowed by law and the rules of the Court, duly excepted to such refusal.

I charge you that under the laws of the United States, an indictment charging an offense, to wit, a conspiracy to defraud the United States, must be presented within three years from the time of the commission of the offense, and if you find from the evidence in this case, that the indictment presented herein was not presented within three years from the date of the commission of the offense, or if you have a reasonable doubt, then it would be your bounden duty to return a verdict of not guilty.

The Court refused to give said instruction and the defendants Edwin F. Meyer and Emar Goldberg, before the retirement of the jury and within the time allowed by law and the rules of the Court, duly excepted to such refusal.

I charge you that if you have a reasonable doubt as to whether or not the alleged offense here complained of, was committed within three years of the time of the presentment of [1301—1248] the indictment herein, it would be your duty as sworn jurors to give the defendant the benefit of such doubt and return a verdict of not guilty.

The Court refused to give said instruction and the defendants Edwin F. Meyer and Emar Goldberg, before the retirement of the jury and within the time allowed by law and the rules of the Court, duly excepted to such refusal.

I charge you that the defendant is entitled to in-

terpose any defense allowed him by the law, and this includes the defense of the Statute of Limitations, and you should not be prejudiced against the defendant in the course of such defense; and I further charge you before you can find the defendant guilty, you must find from the evidence beyond all reasonable doubt, that the offense, if committed, occurred within three years from the date of filing of indictment herein.

The Court refused to give said instruction and the defendants Edwin F. Meyer and Emar Goldberg, before the retirement of the jury and within the time allowed by law and the rules of the Court, duly excepted to such refusal.

After the conclusion of the said charge to the jury by the Court and before the retirement of the said jury the said defendants Edwin F. Meyer and Emar Goldberg, then and there duly excepted to the following instruction given by the Court: [1302—1249]

You are instructed that every man is presumed to intend the natural and probable consequences of his voluntary acts; and if you should find that such a conspiracy as alleged in the indictment, having for its object or purpose some one or more of the objects and purposes enumerated in the indictment, existed, and that any one of the conspirators, during the life of such conspiracy, in pursuance of such conspiracy, and to effect the object thereof, set in motion any agency or power which would naturally result in the performance of any one of the overt acts charged in the indictment, and the performance of such act in fact result therefrom, and was so per-

formed during the life of such conspiracy and to effect the object and purpose of such conspiracy, then you are instructed that such defendants intended the natural consequences, and such act would in law be the act of all of the co-conspirators irrespective of which member of the conspiracy set in motion such agency or power or performed such overt act. If you find a conspiracy was entered into between two or more of the defendants charged in the indictment, and that defendant Goldberg was a member of such conspiracy, and that Goldberg, in furtherance of such conspiracy, obtained Silverstone's endorsement on that certain check set out in the indictment and issued to the Fowler Metal Company and cashed the same at the bank, and by reason of such act the defendant Goldberg or his company, the Great Western Smelting & Refining Company, secured the money, such act on the part of Goldberg would be the act of all of the persons who entered such conspiracy, and would be an overt act to effect the object of the conspiracy, if you find beyond a reasonable doubt that a conspiracy was entered into as charged. [1303—1250]

After the jury had returned a verdict of guilty the Court set the 22d day of November, 1913, as the day of sentence. Upon said 22d day of November, 1913, the time of sentence was continued by the Court to the 29th day of November, 1913.

Before sentence was imposed upon the defendants the defendants, Edwin F. Meyer and Emar Goldberg, moved the said Court for a new trial and on the said 29th day of November, 1913, the said motion

for a new trial was by the said Court denied, to which ruling and order of said Court denying said motion for a new trial the said defendants Edwin F. Meyer and Emar Goldberg then and there duly accepted.

Before sentence was imposed upon the defendants, the defendants Edwin F. Meyer and Emar Goldberg presented the following motion in arrest of judgment:

*In the District Court of the United States, in and for
the Western District of Washington.*

No. 2039.

UNITED STATES OF AMERICA

vs.

EMAR GOLDBERG, EDWIN F. MEYER et als.,
Defendants.

Motion to Arrest Judgment.

The defendants, Emar Goldberg and Edwin F. Meyer, in the above-entitled cause, before judgment, respectfully move the Court that for error appearing on the face of the indictment and upon the face of the record, that judgment for the United [1304—1251] States of America, be arrested and withheld, and conviction herein rendered be declared null and void.

Said motion is based on the following grounds:

(1) That the indictment herein fails to charge the offense of conspiracy to defraud the United States.

(2) That the indictment does not state facts sufficient to constitute a public offense against the laws

of the United States.

(3) That the indictment fails to charge any offense against the laws of the United States.

(4) That the indictment fails to charge a combination or conspiracy to violate any law of the United States.

(5) That the indictment fails to set forth any act in violation of section 5440 of the Revised Statutes of the United States committed within three years prior to the filing thereof.

(6) That the indictment affirmatively shows that the alleged violation of section 5440 of the Revised Statutes was committed and completed on the 26th day of May, 1908, and said indictment was not presented until the 31st day of May, 1911.

(7) That the indictment shows that the last overt act to effect the object of the alleged conspiracy was committed on the 26th day of May, 1908, or prior thereto.

(8) That the indictment shows that no overt act occurred within three years of the finding of the indictment herein. [1305—1252]

(9) That the indictment shows upon its face that the alleged offense was barred by section 1044 of the Revised Statutes of the United States.

(10) That the said indictment was and is void under section 1044 of the Revised Statutes of the United States.

(11) That the said indictment was found contrary to section 1044 of the Revised Statutes of the United States.

(12) That the said indictment was not found

within three years next after said alleged offense was committed.

(13) That said indictment shows upon its face that the alleged offense was completed on the 26th day of May, 1908, when the check set out in said indictment was actually issued.

(14) That said indictment fails to set forth any overt act as required by section 5440 of the Revised Statutes.

(15) That said indictment is void in this that the time of said conspiracy is laid as on or about the 2d day of June, 1908, and the alleged overt acts therein set forth are alleged to have occurred prior to that date.

WHEREFORE for error appearing on the face of the indictment and upon the face of the record the defendants pray that the judgment upon the verdict be arrested and withheld and conviction herein declared to be null and void.

Dated November 29th, 1913.

MORRIS & SHIPLEY and
ANDREW R. BLACK,

Attorneys for Defendant Edwin F. Meyer.

JAMES A. KERR and
BERT SCHLESINGER,

Attorneys for Defendant Emar Goldberg. [1306—
1253]

And on the said 29th day of November, 1913, the said motion in arrest of judgment was by the said Court denied, to which ruling and order of said Court denying the said motion in arrest of judgment

the said Edwin F. Meyer and Emar Goldberg then and there duly excepted.

The defendants, Edwin F. Meyer and Emar Goldberg, hereby present the foregoing as their Bill of Exceptions herein and respectfully ask that the same may be allowed, signed, sealed and made a part of the record in this case.

Dated this 27th day of January, 1914.

MORRIS & SHIPLEY and
A. R. BLACK,

Attorneys for Defendant Edwin F. Meyer.

KERR & McCORD,
BERT SCHLESINGER,

Attorneys for Defendant Emar Goldberg.

[1307—1254]

**[Stipulation for Settlement and Allowance of Bill of
Exceptions, etc.]**

It is hereby stipulated and agreed that the foregoing BILL OF EXCEPTIONS proposed by the defendants herein may be signed, settled and allowed by the Court. It shall not be necessary to print the exhibits of the Government and the exhibits of the defendants, introduced in evidence in said action and designated herein, but the originals may be attached to the transcript on appeal by the clerk and the same may be transmitted to the United States Circuit Court of Appeals for the Ninth Circuit and used on the hearing of said appeal, with the same force and effect as though the same were inserted *verbatim* herein.

Dated January 27th, 1914.

CLAY ALLEN,

United States Attorney.

MORRIS & SHIPLEY and

A. R. BLACK,

Attorneys for Defendant Edwin F. Meyer.

KERR & McCORD,

BERT SCHLESINGER,

Attorneys for Defendant Emar Goldberg.

[Order Allowing Bill of Exceptions.]

This BILL OF EXCEPTIONS, having been duly presented to the Court within the time allowed by law and the rules of the Court within the time extended by order of the Court duly and regularly made, is now signed, sealed and made a part of the Records in the case, and is allowed as correct.

Dated March 14, 1914.

JEREMIAH NETERER,

Judge of the District Court of the United States,
in and for the Western District of Washington,
Northern Division. [1308—1255]

[Indorsed]: Proposed Bill of Exceptions on Behalf of Defendants, Edwin F. Meyer and Emar Goldberg. Vol. 8, Pages 1101 to 1255. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division. Mar. 14, 1914. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy. [1309]

*In the District Court of the United States for the
Western District of Washington, Northern
Division.*

No. 2039.

UNITED STATES OF AMERICA

vs.

EDWIN F. MEYER and EMAR GOLDBERG,
Defendants.

Petition for Writ of Error.

Your petitioners, Edwin F. Meyer and Emar Goldberg, the above-named defendants, bring this their petition for Writ of Error to the District Court of the United States, in and for the Western District of Washington, and in that behalf your petitioners show:

That on the 29th day of November, 1913, there was made, given and rendered in the above-entitled cause a judgment against your petitioners, wherein and whereby each of your petitioners was adjudged and sentenced to imprisonment, to wit: The said Edwin F. Meyer for a term of 15 months and to pay a fine of Two Thousand Dollars, and the said Emar Goldberg for a term of 15 months and to pay a fine of Two Thousand Dollars; and your petitioners show that they are advised by counsel and they aver that there was and is manifest error in the record and proceedings had in said cause and in the making, giving and rendition and entry of said judgment and sentence to the great injury and damage of your petitioners, all of which errors will be more fully

made to appear by an examination of [1310] the Bill of Exceptions to be tendered and filed and in the Assignment of Errors hereinafter set out and to be presented herein; and to that end thereafter that the said judgment, sentence and proceedings may be reviewed by the United States Circuit Court of Appeals for the Ninth Circuit, your petitioners now pray that a Writ of Error may be issued directed therefrom to the District Court of the United States, for the Western District of Washington, returnable according to law and the practice of this Court, and that there may be directed to be returned pursuant thereto a true copy of the record, bill of exceptions, assignment of errors and all proceedings had in said cause and that the same may be removed to the United States Circuit Court of Appeals for the Ninth Circuit, to the end that error, if any has happened, may be duly corrected and full and speedy justice done your petitioners.

And your petitioners make the assignment of errors presented herewith, upon which they will rely and which will be made to appear by a return of the said record, in obedience to the said Writ.

WHEREFORE, your petitioners pray the issuance of a Writ as herein prayed, and pray that the assignment of errors, presented herewith, may be considered as their assignment of errors upon the Writ, and that the judgment rendered in this cause may be reversed and held for naught, and that said cause be remanded for further proceedings, and that they be awarded [1310½] a *supersedeas* upon

said judgment and all necessary and proper process, including bail.

EDWIN F. MEYER,
EMAR GOLDBERG,

Petitioners.

MORRIS & SHIPLEY,
ANDREW R. BLACK,
KERR & McCORD and
BERT SCHLESINGER,

Attorneys for Defendants.

[Indorsed]: Petition for Writ of Error. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division. Mar. 24, 1914. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy. [1311]

*In the District Court of the United States, for the
Western District of Washington, Northern
Division.*

No. 2039.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

EDWIN F. MEYER and EMAR GOLDBERG,

Defendants.

Order Allowing Writ of Error and Supersedeas.

The defendants Edwin F. Meyer and Emar Goldberg, having heretofore presented to the Court and filed herein their petition, praying for the allowance of a writ of error, and for a *supersedeas* pending the determination of said writ of error, and having filed

with said petition herein, their assignment of errors intended to be urged in support of said writ of error, praying also, that a transcript of the record and proceedings and papers upon which the judgment herein was rendered, duly authenticated, be sent to the Circuit Court of Appeals for the Ninth Judicial Circuit, and that they be awarded a *supersedeas* upon said judgment and all necessary and proper process including bail, and that such proceedings may be had as may be proper in the premises; and it appearing that subsequent to the entering of the final judgment herein the defendants and each of them were by the Court duly admitted to bail, and that the bail of each thereof was by order of Court duly fixed as follows: Edwin F. Meyer, \$5,000; Emar Goldberg, \$5,000, to be conditioned and operate as *supersedeas* bonds pending the determination of the writ of error, to be issued and prosecuted herein, which bonds were duly given, approved by the Court and filed herein. [1312]

In consideration whereof, the Court does allow said petition and further orders that a writ of error herein issue as prayed for, and that the bonds heretofore given and filed herein by said defendants, be continued and shall operate as *supersedeas* bonds, and shall supersede the judgments herein pending the determination on said writ of error.

Done in open court this 24th day of March, 1914.

JEREMIAH NETERER,

District Judge of the United States for Western District of Washington.

[Indorsed]: Order Allowing Writ of Error and Supersedeas. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, Mar. 24, 1914. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy. [1313]

*In the District Court of the United States, for the
Western District of Washington, Northern
Division.*

No. 2039.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

EDWIN F. MEYER and EMAR GOLDBERG,

Defendants.

Supersedeas Bond.

Whereas this day at a term of the District Court of the United States for the Western District of Washington, in a suit pending in the said court between the United States of America, and Edwin F. Meyer and Emar Goldberg, defendants, a judgment and sentence was made, given and rendered and entered against the said Edwin F. Meyer and Emar Goldberg; and

Whereas, said above-named defendants, and each of them, have given notice of their intention to apply within thirty days hereafter for the allowance of a writ of error to the Circuit Court of Appeals of the United States for the Ninth Circuit, and to cause their said conviction and the conviction of each of them, and said cause to be reviewed on writ of error

from the Circuit Court of Appeals of the Ninth Circuit; and

Whereas, on application in that behalf, the Judge of said District Court has fixed a *supersedeas* bond in the sum of \$5,000.00 which this bond is intended to be a compliance with;

Now, therefore, I, Edwin F. Meyer, as principal, and the other subscribers hereto as sureties, jointly and severally acknowledge ourselves held and firmly bound unto the United States of America in the sum of \$5,000.00.

Conditioned that the said Edwin F. Meyer will apply for said writ of error within said 30 days from this date, and shall prosecute his said writ of error to effect, and if he fails to make [1314] his plea good and the judgment of the said Circuit Court of Appeals for the Ninth Circuit shall be finally rendered against him, he will obey, perform and carry out the final judgment of said Circuit Court of Appeals of the United States for the Ninth Circuit and of this Court, upon said writ of error, and any other judgment and order of said Courts in the above-entitled cause, including the payment of any fine and all costs if any, assessed against him, and that he will be and appear before the said United States District Court, before the Western District of Washington, pursuant to such final judgment, and the sentence of said District Court hereinbefore pronounced and entered in said cause.

In testimony whereof, the said principal and sureties have hereunto affixed their signatures this

1446 *Edwin F. Meyer and Emar Goldberg*

29th day of November, 1913.

EDW. F. MEYER. [Seal]

H. B. KENNEDY. [Seal]

EVERETT S. DAM. [Seal]

United States of America,

Western District of Washington, King County,—ss.

H. B. Kennedy and Everett S. Dam, the above-named sureties, each for himself deposes and says: That he is a resident of King County, Washington; that he is not an attorney or counselor at law, sheriff, clerk of the Superior Court, or other officer of said Court, and that he is worth the sum of \$10,000.00 in his own right above all debts and liabilities, and exclusive of property exempt from execution, in separate property in the State of Washington.

H. B. KENNEDY.

EVERETT S. DAM.

Subscribed and sworn to before me this 29th day of November, 1913.

[Seal]

ED M. LAKIN,

Deputy Clerk, U. S. Dist. Court, Western Dist. of Washington. [1315]

Form of bond and sufficiency of sureties approved:

WINTER S. MARTIN,

Asst. United States Attorney.

Within bond accepted and approved this 2d day of Dec., 1913.

JEREMIAH NETERER,

District Judge.

[Indorsed]: Supersedeas Bond. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division. Dec. 2, 1913. Frank L. Crosby, Clerk. By E. M. L., Deputy. [1316]

*In the District Court of the United States, for the
Western District of Washington, Northern
Division.*

No. 2039.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

EDWIN F. MEYER and EMAR GOLDBERG,

Defendants.

Supersedeas Bond.

WHEREAS, this day at a term of the District Court of the United States for the Western District of Washington, in a suit pending in the said court, between the United States of America and Edwin F. Meyer and Emar Goldberg, defendants, a judgment and sentence was made, given and rendered, and entered against the said Edwin F. Meyer and Emar Goldberg; and

WHEREAS, said above-named defendants, and each of them, have given notice of their intention to apply within 30 days hereafter for the allowance of a Writ of Error to the Circuit Court of Appeals of the United States for the Ninth Circuit, and to cause their said conviction and the conviction of each of them, and said cause to be reviewed on Writ from

the Circuit Court of Appeals of the Ninth Circuit; and

WHEREAS, on application in that behalf, the Judge of said District Court has fixed a supersedeas bond in the sum of \$5,000.00 which this bond is intended to be a compliance with;

NOW, THEREFORE, I, Emar Goldberg, as principal, and the Illinois Surety Company as surety, jointly and severally acknowledge ourselves held and firmly bound unto the United States of America, in the sum of \$5,000.00; [1317]

Conditioned that the said Emar Goldberg will apply for said Writ of Error within said 30 days from this date, and will prosecute the said Writ of Error to effect, and if he fails to make his plea good, and the judgment of said Circuit Court of Appeals for the Ninth Circuit, shall be finally rendered against him, he will obey, perform and carry out the final judgment, including fine and costs assessed, of said Circuit Court of Appeals of the United States for the Ninth Circuit and of this Court, upon said Writ of Error, and any other judgment and order of said Courts in the above-entitled cause, and that he will be and appear before the said United States District Court for the Western District of Washington, pursuant to such final judgment and the sentence of said District Court hereinbefore pronounced and entered in this cause.

In testimony whereof, the said principal and surety have hereunto affixed their signatures, by their duly authorized attorney in fact as to said

surety, this 29th day of November, 1913.

EMAR GOLDBERG. [Seal]

ILLINOIS SURETY COMPANY. [Seal]
[Seal]

By FRANK G. OPIE,
Its Attorney in Fact.

Form of bond and sufficiency of surety approved.

CLAY ALLEN,
United States Attorney.

Within bond accepted and approved this 29th day
of November, 1913.

JEREMIAH NETERER,
District Judge.

[Indorsed]: Supersedeas Bond. Filed in the U.
S. District Court Western Dist. of Washington,
Northern Division. Dec. 1, 1913. Frank L. Crosby,
Clerk. By E. M. L., Deputy. [1318]

*In the District Court of the United States, in and for
the Western District of Washington.*

No. 2039.

UNITED STATES OF AMERICA

vs.

EMAR GOLDBERG, EDWIN F. MEYER et als.,
Defendants.

**Assignment of Errors of Defendants, Emar Gold-
berg and Edwin F. Meyer.**

Emar Goldberg and Edwin F. Meyer, defendants
in the above-entitled cause, and plaintiffs in error
herein, having petitioned for an order from said
Court permitting them to procure a Writ of Error

to this Court, directed from the United States Circuit Court of Appeals for the Ninth Circuit, from the judgment and sentence entered in said cause against said Emar Goldberg and Edwin F. Meyer, now make and file with their said petition the following assignment of errors herein, upon which they will apply for a reversal of said judgment and sentence upon the said writ, and which said errors, and each, and every of them, are to the great detriment, injury and prejudice of the said defendants and in violation of the rights conferred upon them by law; and they say that in the record and proceedings in the above-entitled cause, upon the hearing and determination thereof in the District Court of the United States, for the Western District of Washington, there is manifest error, in this, to wit: [1319]

(1) That the Court erred in refusing to give Instruction No. 32, requested by defendants, as follows:

“I advise your returning a verdict of ‘not guilty’ as to the defendant Emar Goldberg, as the evidence introduced by the Government is insufficient to warrant a verdict of ‘guilty.’ ”

(2) That the Court erred in refusing to give Instruction No. 33, requested by defendants, as follows:

“I advise you to return a verdict of not guilty as to Emar Goldberg as the evidence conclusively shows that the last overt act occurred more than three years before the filing of the indictment herein.”

(3) That the Court erred in refusing to give Instruction No. 34, requested by defendants, as follows:

“I charge you to return a verdict of not guilty

as to the defendant Emar Goldberg for the reason that the alleged violation of Section 5440 (Revised Statutes of the United States) was committed and completed on the 26th day of May, 1908, and the indictment in this case was not presented until the 31st day of May, 1911."

(4) That the Court erred in refusing to give Instruction No. 35, requested by defendants, as follows:

"I charge you to return a verdict of not guilty as to the defendant Emar Goldberg, as the undisputed facts show that no overt act to effect the objects of alleged conspiracy occurred within the period limited by Section 1044 (Revised Statutes of United States)."

(5) That the Court erred in refusing to give Instruction No. 36, requested by defendants, as follows:
[1320]

"I charge you that the alleged offense in this case was ended on the date of delivery of the check in question, to wit, on the 26th day of May, 1908, and was barred by the statute of limitations on the 26th day of May, 1911."

(6) That the Court erred in refusing to give Instruction No. 37, requested by defendants, as follows:

"I charge you that before you can return a verdict of guilty you must find that an overt act occurred within three years of the filing of the indictment herein.

In this connection I charge you that an overt act is an act done to effect the objects of the conspiracy; settlements between the alleged

conspirators or with agents for profits, are not overt acts.”

(7) That the Court erred in refusing to give Instruction No. 38, requested by defendants, as follows:

“I charge you that under the laws of the United States, an indictment charging an offense, to wit, a conspiracy to defraud the United States, must be presented within three years from the time of the commission of the offense, and if you find from the evidence in this case, that the indictment presented herein, was not presented within three years from the date of the commission of the offense, or if you have a reasonable doubt, then it would be your bounden duty to return a verdict of not guilty.”

(8) That the Court erred in refusing to give Instruction No. 39, requested by defendants, as follows:

“I charge you that if you have a reasonable doubt as to whether or not the alleged offense here complained of, was committed within three years of the time of the presentment of the indictment herein, it would be your duty as sworn jurors to give the defendant the benefit of such doubt and return a verdict [1321] of not guilty.”

(9) That the Court erred in refusing to give Instruction No. 40, requested by defendants, as follows:

“I charge you that the defendant is entitled to interpose any defense allowed him by law, and this includes the defense of the statute of limitations, and you should not be prejudiced against the defendant in the course of such de-

fense; and I further charge you before you can find the defendant guilty you must find from the evidence beyond all reasonable doubt, that the offense, if committed, occurred within three years from the date of filing of indictment herein."

(10) The Court erred in overruling and denying defendants' motion in arrest of judgment upon the grounds in said motion taken and assigned, to wit:

"(1) That the indictment herein fails to charge the offense of conspiracy to defraud the United States.

(2) That the indictment does not state facts sufficient to constitute a public offense against the laws of the United States.

(3) That the indictment fails to charge any offense against the laws of the United States.

(4) That the indictment fails to charge a combination or conspiracy to violate any law of the United States.

(5) That the indictment fails to set forth any act in violation of Section 5440 of the Revised Statutes of the United States committed within three years prior to the filing thereof.

(6) That the indictment affirmatively shows that the alleged violation of Section 5440 of the Revised [1322] Statutes was committed and completed on the 26th day of May, 1908, and said indictment was not presented until the 31st day of May, 1911.

(7) That the indictment shows that the last overt act to effect the object of the alleged

conspiracy was committed on the 26th day of May, 1908, or prior thereto.

(8) That the indictment shows that no overt act occurred within three years of the finding of the indictment herein.

(9) That the indictment shows upon its face that the alleged offense was barred by Section 1044 of the Revised Statutes of the United States.

(10) That the said indictment was and is void under Section 1044 of the Revised Statutes of the United States.

(11) That the said indictment was found contrary to Section 1044 of the Revised Statutes of the United States.

(12) That the said indictment was not found within three years next after said alleged offense was committed.

(13) That said indictment shows upon its face that the alleged offense was completed on the 26th day of May, 1908, when the check set out in said indictment was actually issued.

(14) That said indictment fails to set forth any overt act as required by Section 5440 of the Revised Statutes.

(15) That said indictment is void in this, that the time of said conspiracy is laid as on or about the 2d day of June, 1908, and the alleged overt acts therein set forth are alleged to have occurred prior to that date."

(11) The Court erred in overruling defendants' [1323] objection to the following questions pro-

pounded to the witness, Hiram S. House:

“Q. I call your attention to the Government’s Identification No. 21, page 4, which is stamped on the back, Plaintiff’s Exhibit No. 21, 22, and 24, offered for identification. Is that taken from the file of the Great Western Smelting and Refining Company? A. Yes, sir.

Q. Is it now in the same condition in which you received it? A. Yes, sir.

Mr. SCHLESINGER.—We object to the introduction in evidence of exhibit 21, marked for identification, embracing both checks together, embracing checks Nos. 4972 and 4973, upon the ground that they are all irrelevant and immaterial and have nothing to do with any of the issues involved in this case.

The COURT.—Objection overruled and exception allowed.”

(12) The Court erred in overruling defendant’s objection to the following question propounded to the witness, House:

“Q. Directing your attention to sheet No. 525 in the Great Western Smelting and Refining Company’s book, this Government Exhibit No. 28, and the bill for that same transaction, state to the jury just what book that is? * * *

A. This shows on September 30, 1907

Mr. VANDERVEER.—I object to the witness reading from a paper not yet in evidence. This bears date September 30th, 1907.

Mr. ALLEN.—We now offer in evidence exhibit 28.

Mr. KERR.—We object to it on [1324]
the ground it is immaterial and has nothing to
do with this transaction.

Mr. ALLEN.—I offer in evidence this partic-
ular page, sheet No. 525 in the Great Western
Smelting and Refining Company's book, and
which is now open before the clerk.

The COURT.—Exhibit No. 28?

Mr. ALLEN.—Yes, sir; 525.

The COURT.—What is the objection to it?

Mr VANDERVEER.—The objection that on
the face of it, it appears to be immaterial to any
issue in this case. It relates to a transaction
dated September 1907, has no reference to this
particular transaction, and before it is admitted
counsel should show the Court, if not to the de-
fendants, what its materiality is.

Mr. ALLEN.—That is what we propose to do.

Mr. SCHLESINGER.—We join in that ob-
jection.

Mr. SCHLESINGER.—Now, if your Honor
please, I understand the unique proposition now
advanced is they are going to show by certain
documents the value of certain goods at certain
times. I submit that is not competent evidence
because the conditions existing at that time are
not shown by these exhibits.

The COURT.—The objection is overruled and
exception allowed. I think that when you show
that they paid eight cents, the Government have
a right to show what that was sold for and have
the whole transaction before the jury. [1325]

Mr. SCHLESINGER.—Let me ask you a question, please, Mr. Allen, while we are on the subject: Could you say now, taking this lot at 1907, could you say without a knowledge of the conditions surrounding the Great Western Smelting and Refining Company, how much they should have gotten for that same lot of zinc in 1907?

Mr. ALLEN.—We are going to show how much you did get as a matter of fact.

Q. I call your attention to Defendant's Exhibit 'M' offered here on behalf of the defendant, what does that show with reference to the cost of the zinc of that particular car?

Mr. SCHLESINGER.—We object to that upon the ground it is irrelevant, immaterial and incompetent. It does not fix the question as to the price of zinc in Seattle at a particular locality, and he is absolutely disqualified from testifying. He has not been brought in here as a man knowing values, but simply as an expert accountant, and for no other purpose, and this testimony is in no wise binding upon Mr. Goldberg.

Mr. ALLEN.—I call your attention to that part of Defendant's Exhibit 'M' which fixes the price that this Matheson and Heggler sold them nearly a car of zinc in the month of September, 1907. Now, can you, by reference to sheet 359 of the Great Western Smelting and Refining Company's books, 360 and 543, can you state to the jury the price obtained by this concern for

zinc at that time? [1326]

Mr. SCHLESINGER.—We object on the same ground. As I understand the province of an expert accountant, it is to make clear matters of complicated accounts, and point out, and that is what he is put here for. He is not put here to determine what was or what was not a reasonable profit or selling price of this zinc.

Q. Can you, by reference to those books, ascertain the price obtained for zinc at that time, referring more particularly to 259, 360 and 543.

Mr. SCHLESINGER.—This is subject to our objection as to its competency and materiality.

The COURT.—Objection overruled and exception allowed.

Q. Page 359, the Government's Exhibit No. 26, shows on September 4th, 1907, a sale of zinc plates to John Simm Metal Works, 4587 pounds at \$9.50. What was the date of that?

A. September 4th, 1907, 4587 pounds at \$9.50.

Q. Referring to 360, what does that show?

A. Page 360 of Government's Exhibit 26—

Mr. SCHLESINGER.—Same objection.

A. (Continuing.) —shows a sale of September the 4th, 1907, to the Pacific Engineering Company, of 1036 pounds at \$9.55, at \$958.44. Cartage \$3.00, total \$961.44."

(13) The Court erred in overruling defendant's objection to the following testimony:

"Q. I call your attention to Sheet 543, what does that show?

A. Page 543 of Government Exhibit No. 26

shows the sale on November 20, 1907, to the John Simm Metal Works of 8 boxes of zinc plates $1\frac{1}{2} \times 6 \times 12$, 3992 pounds at nine and one-quarter cents, \$369.26.

Mr. ALLEN.—We now offer in evidence these three sheets, 359, 360 and 543, and also sheet 525 with the two checks. [1327]

The COURT.—What are those?

Mr. ALLEN.—Government Exhibit 26.

Mr. KERR.—These parties were all jobbers, Simm and Company were the jobbers in this city.

The COURT.—What exhibit is that? Exhibit 26?

Mr. ALLEN.—Yes, a part of exhibit 26. We offer these in evidence.

The COURT.—Objection overruled and exception allowed.

Mr. SCHLESINGER.—I offer a suggestion. I don't want to be constantly objecting. May it be understood all this line of testimony is deemed objected to upon the grounds heretofore specified by us, without the necessity of having to repeat the objection, and the exception follow.

The COURT.—Yes, sir."

(14) The Court erred in overruling defendant's objection to the following testimony:

"Q. I call your attention to Corder's Book No. 424 and the Great Western Smelting and Refining Company No. 574, of date December 3d, 1907? A. Yes, sir.

Q. What do you find there at sheet 424?

A. This book hasn't been put in evidence.

Q. Where did you find that book?

A. I got it from Mr. Garrett, receiver for the W. A. Corder Company.

Q. It was part of the files of the W. A. Corder Company, was it? A. Yes, sir.

Mr. ALLEN.—We offer it for identification, and offer it in evidence.

Mr. VANDERVEER.—Do you offer the whole book?

Mr. ALLEN.—No, sheet 424. [1328]

Mr. VANDERVEER.—I object as immaterial and irrelevant. I do it for the purpose of presenting a question, a question in which both of us ought to be interested in getting the Court's ruling. [1329]

Mr. VANDERVEER.—Your Honor overrules my objection?

The COURT.—Yes, objection overruled and exception allowed.

Q. That sheet I will then read to the jury, ask you to read it, sheet 424, exhibit 60.

A. Sheet 424, Government's Exhibit 60, sales sheet of W. A. Corder Company, sold to United States Navy Pay Office, order 58, N. S. F., 9 rolls zinc plates one half by twenty-four by thirty six; 9 rolls zinc plates, one half by twenty-four by forty-eight; 9 rolls zinc plates, five eighths by twenty-four by thirty-six; 3713 pounds, 10 and one fourth's cents, \$380.58. Bought by W. A. Corder Company direct. G. W. S. & Ref.

Company, 4328, one half profit.”

(15) The Court erred in admitting the following testimony, over the objection of counsel for defendants:

“(By Mr. RIDDELL.)

Q. You were showing the counter sales of zinc on December 11th. Give the date, number of pounds and price per pound.

A. Date, December the 3rd, 1907, to Lewis, Anderson, Ford & Company, 1 by 6 by 12—

Q. Just give the price per pound?

A. 1125 pounds at ten and one quarter cents.

Q. Sheet 572?

A. Date is December 5th, 1907, sold to the Great Western Smelting and Refining Company, Saratoga, Seattle, Washington, 450 pounds at 11 cents.

Q. 574?

A. December 5th, 1907, Great Western Smelting and Refining Company, 567 pounds at 702 and ten and one-half dollar's freight.

Q. Ten and a half dollar's freight? [1330]

A. Yes, sir.

Q. That is how many pounds?

A. 567.

Q. You don't pretend, Mr. Kerr, that the Steamship Company was a jobber?

Mr. KERR.—I claim this last one is cost price.

Q. 582?

A. Dated December 26th, 1907, to Puget Sound Tug Company, 575 pounds at 11 cents.

Mr. RIDDELL.—I think we could stipulate

when they are jobbers and when they are not.

Mr. VANDERVEER.—Also stipulate sales to the Government had to be shipped in paper boxes, separate, shipped across the Sound.

Mr. KERR.—I will admit these two, 11 cents, were not jobbers.

Mr. SCHLESINGER.—I don't know whether my objection is quite clear, whether my objection covers this line of testimony as to the Corder transaction. May it be understood.

The COURT.—Yes, it is understood.

Q. 58?

A. December 14th, 1907, sold to Lewis, Anderson, Ford & Company, 190 at 10 and one quarter cents.

Q. You say they are jobbers?

A. Yes, they are jobbers.

Q. 593? A. I have got 592 here.

Q. Did you get 592?

A. No, I haven't read it. December 12th, 1907, sold to the Great Western Smelting and Refining Company, 1125½ pounds at 10¼ cents, cost to cut the same, 876.

Q. 593? [1331]

A. Dated December 13th, 1907, Great Western Smelting and Refining Company, 225 pounds, no price, 1656 and freight 281.

Q. 398?

A. Dated December 21st, 1907, sold to Northwestern Steamship Company, 'Lauretta Clara,' 206 pounds at 11 cents.

Q. 206 pounds at 11 cents? A. Yes, sir.

Q. They are not jobbers either?

Mr. KERR.—No, they are not jobbers.

Q. That is to a private individual. 608?

A. Dated December 28th, 1907, sold to Northwestern Steamship Company, Steamship 'Dora,' 478 pounds at 11 cents.

Q. That is again to a private individual.

Mr. KERR.—Those are all in December.

Q. That is on that car that was bought at 8 cents?

A. I don't know on which car this was sold. Some of them were small zines, some of them large.

Mr. VANDERVEER.—It *it not* material we move to have it stricken; it is offered on the theory it will explain the price at which a certain car was sold. The witness says it does not do so."

(16) The Court erred in admitting the following testimony over the objection of counsel for defendants:

"Mr. RIDDELL.—It was subsequent to the receipt of that car.

Q. Turn to Great Western Smelting and Refining sheet, 627.

A. Sheet 627. Great Western Smelting and Refining Company, dated January the 9th, 1908, W. A. Corder Company, Seattle, one half sale zinc plates, December sale, 2904 pounds, \$168.04.

Q. Turn to Corder Company sales, sheet 629.

A. Dated January 13th, 1908, sold to Alaska Steamship Company, steamer 'Olympia,' 468

pounds at 11 cents. [1332]

Mr. KERR.—I concede they were not jobbers.

Q. Sheet 632?

A. Dated January 14th, 1908, sold to Pacific Engineering Company, 411 pounds at 10 cents.

Q. 11 cents the day before and 10 cents this day. Do I understand these people are jobbers or not?

Mr. KERR.—Yes, sir, probably are jobbers.

Q. The sale at 11 cents was to the consumer, and the sale at 10 cents to the jobber?

Mr. KERR.—Yes.

Q. Next sheet 637?

A. Dated January 20th, 1908, sold to Pacific Engineering Company 38 pounds at 10 cents.

Q. 631?

A. Dated February 7th, 1908, sold to Lewis, Anderson, Ford Company, 234 pounds at 10¼ cents.

Q. 662?

A. Dated February 7th, 1908, sold to City of Seattle, Fire Department, 209 pounds at 10 cents.

Q. That was, I presume, not a jobber. 667?

A. Dated February the 4th, 1908, sold to Alaska Steamship Company, 'Saratoga,' 500 pounds at 9½ cents.

Q. 680?

A. Dated February 27th, 1908, P. C. S. F. Company, Pacific Coast steamship 'Coral' 2486 pounds at 9 cents.

Q. 2486 pounds at 9 cents?

A. All of these I am reading refer to zinc plates.

Q. Now 701.

A. Dated March 10, 1908, United States Navy Pay Office requisition No. 336, 4198 pounds at 12½ cents. [1333]

Q. This sale of 4198 pounds at 12½ cents was how many days after the sale of the 2000 pounds at 9 cents? A. 11 days.

Q. We have your requisition 336.

By a JUROR.—I didn't get all the dates, were all these within a period of two or three months?

A. The sale to the Pacific Engineering Company was made February 27th, 1908 at 9 cents. The sale to the United States Navy Pay Office was made on March 10th at 12½ cents."

(17) The Court erred in admitting the following testimony over the objection of counsel for defendants, upon the ground that the same was irrelevant, immaterial and incompetent and not within the issues:

"Q. Now turn to page 716.

A. Page 716, W. A. Corder Company, dated March 21st, 1908, sold United States Navy Pay Office, on the requisition No. 358, says, 'Render invoice to General Storekeeper as follows: 3887 pounds ½ by 24 by 36 rolled zinc plates at 12½ cents, \$485.87. Charge their account, then write above rejected goods, 3,887 pounds ½ by 24 by 36 rolled zinc plates, 1½ cents a pound \$58/31.'

Q. Now, do any of these requisitions which are on that say rejected material? A. Yes, sir.

Q. What are those numbers?

A. Requisition No. 81.

Q. For how much?

A. For about 2,800 pounds, estimated cost 15 cents a pound, \$420.

Q. How much was delivered? 4,421 pounds?

A. 4,421 pounds. [1334]

Q. How much was rejected?

A. 1,617 pounds.

Q. What is the next, the other delivery?

A. On requisition No. 79—

Mr. SCHLESINGER.—All over our objection as irrelevant, immaterial and incompetent.

The COURT.—The same matter I guess the Court has passed on several times.”

(18) The Court erred in admitting the following testimony over the objection of counsel for defendants, upon the ground that the same was irrelevant, immaterial and incompetent:

“Mr. RIDDELL.—Taking up the same sales we were on, continuing. There is a debit at one half cent a pound, relating to other zinc which has been rejected formerly.

Q. What was the date of the other requisition?

A. October the 7th, 1907.

Q. What does the amount call for?

A. 2,800 pounds.

Q. What is the price? A. 15 cents.

Q. How much was delivered?

A. 8,084 pounds.

Q. How much was accepted and how much was rejected? A. 2,824 accepted, 2,280 rejected.

Q. Both these exhibits or bids were made by

whom? A. W. A. Corder Company.

Q. What does the total amounts amount to of these two rejections of the W. A. Corder Company bear to the amount of the new requisition which you have just been discussing?

Mr. KERR.—I object to that as being entirely immaterial and irrelevant [1335] and has nothing to do with this transaction, taking up the rejections of the Corder Company.

The COURT.—What is the materiality?

Mr. RIDDELL.—The materiality is this, in March, 1908, Mr. Meyer put through a requisition to take up just exactly the kind of zinc that was rejected for Corder and lying over there on the dock. All this time the price of zinc had been coming down, the sales show it came down from ten cents a pound until they sold 500 pounds to the steamship company at ten cents. Now he put this through at 12½ cents.

Mr. KERR.—The records show in the month of December, 1907, maybe later than that, we have sold and it was passed through jobbers at 11 cents, ten and a quarter cents, but it has nothing to do with this case."

(19) The Court erred in denying the motion of counsel for the defense to strike out the above testimony.

(20) The Court erred in admitting the following testimony over the objection of counsel for defendants, upon the ground that it was irrelevant, immaterial and incompetent and not within the issues:

"(By Mr. ALLEN.)

Q. I call *you* attention to folder of the navy yard, folder Number 153, that is requisition No. 153 of Naval Supply Fund, that is a folder taken from the—

Mr. MORRIS.—Is that the folder that is in evidence?

Mr. ALLEN.—Not as yet. Let me change that to 169, requisition 169.

Mr. KERR.—What date is that?

A. Date November 19, 1907. I call your attention to requisition [1336] No. 169 of Navy Supply Fund; did you take this folder from the records of the Navy Department?

A. Yes, sir.

Q. I call your attention to those persons bidding on this particular award?

Mr. KERR.—What date is that?

Mr. ALLEN.—November 19th, 1907.

Mr. KERR.—I object to that as irrelevant, immaterial and incompetent, it has nothing to do with this controversy.

Mr. ALLEN.—I asked to have this stamped for identification.

The COURT.—It will be admitted. Objection overruled and exception allowed.

(Whereupon said folder was introduced in evidence and marked Government's Exhibit 69.)

Mr. KERR.—I object to the introduction of this transaction as not involving in this indictment in any way, too remote, and absolutely incompetent and irrelevant to any issue in this case.

Mr. ALLEN.—That is November 7th, 1907.

The COURT.—Let him answer. Objection overruled and exception allowed.

Q. Who were these bidders on the award made in this particular transaction?

Mr. KERR.—I object to that on the ground it is immaterial who the bidders were.

The COURT.—Objection overruled and exception allowed. Go ahead and explain to the jurors who were the bidders.

A. The Great Western Smelting and Refining Company bid 14 cents a pound. They received the award for 1,500 pounds at 14 cents. Seattle Hardware Company bid on 500 pounds of the 4,000—the requisition calls for 4,000 pounds. The Seattle Hardware [1337] Company bid on 500 pounds at $10\frac{1}{2}$. That amount was awarded to them. The Pacific Engineering Company bid on the entire 4,000 pounds at $10\frac{1}{2}$ a pound. They receive the award of 2,000 pounds at $10\frac{1}{2}$ cents. The W. A. Corder Company bid on the entire amount at $14\frac{1}{2}$ cents. D. Boles Company said: ‘As we don’t handle zinc, are not in position to bid.’ A. Hamback Company said: ‘Unable to bid.’ Swabacher Hardware Company, ‘Unable to supply.’ Western Hardware and Metal Company, ‘Unable to furnish.’ The unsigned bid of John Finn Metal Works at $9\frac{3}{4}$ cents to be delivered in 12 days.

Mr. KERR.—What do you mean by the ‘unsigned’ bid?

A. Well, it states at the top, it is ‘John Finn

Metal Works,' but it has no signature at the bottom and is filled in for $9\frac{3}{4}$ cents a pound. Bid of the Pacific Metal Works at $10\frac{1}{2}$ cents per hundred. Puget Sound Machinery Depot, 'Unable to cope.'

Q. Was any award made in that transaction to either the W. A. Corder Company or to the Great Western Smelting and Refining Company? A. Yes, sir.

Q. What was the amount of that award?

A. 1500 pounds at 14 cents a pound.

Q. Now, can you ascertain, and do you know any place in the books, that have been offered or identified here of the books of either one of these concerns, can you find such pages or parts therein that refer to that transaction and the participation of either of those concerns in that transaction? A. Yes, sir, I can.

Q. What do you find, what books do you find in reference to it? [1338]

A. This is page 565 of Government's Exhibit No. 26, being sales sheet of the Great Western Smelting and Refining Company.

Q. To whom was the award made for 1500 pounds?

A. To the Great Western Smelting and Refining Company."

(21) The Court erred in admitting the following testimony over the objection of counsel for defendants, upon the ground that it was irrelevant, immaterial and incompetent and not within the issues:

"Q. Who were the persons who were bidding

in that for that award?

Mr. KERR.—I object to that on the ground it is irrelevant, incompetent and immaterial, no matter involved in this controversy.

The COURT.—Objection overruled and exception allowed.

A. The requisition is for—

Mr. KERR.—I object to the witness reading from something that is not in evidence.

Mr. ALLEN.—We now offer this in evidence. It has been properly identified. It is 19, I think.

The COURT.—It has been admitted.

Mr. MORRIS.—This is the Pay Office folder. Have you the folder from the Storekeeper's Office of the navy yard? A. I have it here.

Q. 359, No. 19.

Mr. MORRIS.—I want the Storekeeper's folder.

Q. Taking both of these folders, ascertain for us kindly, and give us the bidders and the amounts.

A. You want me to tell what the requisition is for?

Q. Yes, what is the amount?

A. For 1,933 boiler zincs, one-half by 6 by 12. Bidders were [1339] the Great Western Smelting and Refining Company at 12½ cents a pound, to be delivered at once; W. A. Corder Company at 12½ cents a pound to be delivered on one day; American Iron and Metal Company at 13 cents a pound to be delivered at once. A. Hamback, 'Unable to bid. Do not care.'

Q. To whom was the contract awarded?

A. To the Great Western Smelting and Refining Company.

Q. At what figure?

A. 12½ cents a pound."

(22) The Court erred in admitting the following testimony over the objection of counsel for defendants, upon the ground that it was irrelevant, immaterial and incompetent and not within the issues:

"Mr. SCHLESINGER.—We object, if your Honor please, to the introduction in evidence of a check dated June 2d, 1908, number 4,978, in favor of W. A. Corder & Company in the sum of \$4,974.31, and signed by the Great Western Smelting and Refining Company by Emar Goldberg. Our objection to that is based upon the ground that it is subsequent to the alleged conspiracy, and is therefore immaterial, incompetent and irrelevant, it being after the alleged conspiracy had terminated."

(23) The Court erred in admitting the following evidence over the objection of counsel for defendants, upon the ground that it was irrelevant, immaterial and incompetent and not within the issues:

"We make the same objection to check No. 4972, being a check in favor of Emar Goldberg—
The CLERK.—Exhibit '21.'

Mr. SCHLESINGER.—That is Exhibit '21.'
[1340]

The COURT.—Very well.

Mr. SCHLESINGER.—4973, being a check in favor of Emar Goldberg in the sum of \$210

and signed Great Western Smelting and Refining Company, upon the ground that that has nothing to do with the transaction in question, does not relate to the alleged conspiracy and is a transaction occurring after the termination of the alleged conspiracy.”

(24) The Court erred in admitting the following evidence over the objection of counsel for defendants, upon the grounds that it was irrelevant, immaterial and incompetent and not within the issues:

“And the same objection, your Honor please, to check No. 4972 in favor of Emar Goldberg in the sum of \$500 and signed by Great Western Smelting and Refining Company. We make our objection upon that same ground.”

(25) The Court erred in admitting the following evidence over the objection of counsel for defendants, upon the ground that it was irrelevant, immaterial and incompetent and not within the issues:

“And we further, if your Honor please, object to the introduction and admission in evidence of a check No. 1978, dated Seattle, Washington, June 1st—

The COURT.—What exhibit is that?

Mr. SCHLESINGER.—That is exhibit ‘32.’

The COURT.—‘32’ is a check dated June 1st, 1908.

Mr. SCHLESINGER.—Yes, that is a check, a check payable to E. Goldberg in the sum of \$2,109.60, and signed by W. A. Corder Company, by W. A. Corder, manager. Our objection to that is that it has no relation to the

alleged conspiracy, is not an [1341] overt act in furtherance thereof, and is a transaction occurring after the termination of any alleged conspiracy, and therefore is irrelevant, incompetent and immaterial, and this objection, if your Honor please, applies, it may be understood, to all checks and documents introduced in evidence by the Government relating to transactions occurring after the 26th day of May, 1908, and your Honor will make the same ruling heretofore made and we will take an exception."

(26) The Court erred in admitting the following evidence over the objection of counsel for defendants, upon the ground that it was irrelevant, immaterial and incompetent and not within the issues:

"Mr. ALLEN.—'24' has been filed and admitted. Well, we now offer this check under exhibit '24' in evidence, your Honor. It is a check for \$336—

The COURT.—Show it to defendant.

Mr. ALLEN.—Signed by Emar Goldberg—signed by the Great Western people and payable to Emar Goldberg.

Mr. SCHLESINGER.—We object, if your Honor please, to the introduction of this certain evidence upon the ground that it is prior to the conspiracy, alleged conspiracy as laid in the indictment, and therefore is immaterial, irrelevant and incompetent and not within any of the issues.

The COURT.—Admitted, and the jury will consider it is only admitted as a circumstance

as indicating the manner of these various acts.
Has '30' been admitted?"

(27) The Court erred in admitting the introduction of entries appearing in the ledger account of the Fowler Metal Company on the books of the Great Western Smelting and Refining [1342] Company over the objection of counsel for defendant Goldberg.

(28) The Court erred in admitting the following testimony over the objection of counsel for the defendants to which an exception was taken.

"Q. That is the deposit slip of Emar Goldberg in the National Bank of Commerce?"

A. Yes, sir.

Q. What memorandum do you next find with reference to this particular transaction?

A. Reading from Government's Exhibit Number '51,' which is a copy—the originals were offered in evidence and these copies put in—reading from Government's Exhibit Number '51,' which is ledger account of Emar Goldberg in the National Bank of Commerce, shows, on the 2d of June, a debit of \$1,479.60.

Mr. SCHLESINGER.—That, of course, your Honor please, is subject to the objection we have heretofore made.

The COURT.—Yes.

Mr. ALLEN.—In other words, this copy of the account of Emar Goldberg with the National Bank of Commerce shows that on June 2d—

A. His account was charged—

Mr. SCHLESINGER.—Object to that on the ground it is immaterial, irrelevant and incompe-

tent, nothing to do with any of the issues involved in this cause.

The COURT.—Objection overruled. Proceed.

Mr. SCHLESINGER.—Exception.

Mr. ALLEN.—What comparison do you make between that amount which was charged to the account and that of the check referred to here?

Mr. SCHLESINGER.—Same objection, your Honor please. [1343]

The COURT.—Same ruling.

Q. It is \$630, less than the check given him by W. A. Corder Company.

Mr. SCHLESINGER.—Six hundred and how much?

A. Thirty dollars.

Mr. ALLEN.—That went through Emar Goldberg's personal account?"

(29) The Court erred in admitting the following testimony over the objection of counsel for the defendants to which an exception was taken:

"Q. What reference do you next find in the books concerned with reference to this particular transaction?

A. Reading from Government's Exhibit Number '73,' page 9, line 15, under date of June 2d, is a credit to the W. A. Corder Company for \$1,479.60.

Mr. SCHLESINGER.—What was that?

Mr. ALLEN.—\$1,479.60. What memorandum do you next find with reference to this transaction?

A. Reading from Government's Exhibit Number '25,' page 2, which is the ledger account of the W. A. Corder Company on the Great Western Smelting & Refining Company's books, is a credit, under date of June 2d, 1908, for \$1,479.60 cash.

Mr. SCHLESINGER.—Same *object*, if your Honor please, goes to this, of course.

The COURT.—Yes, same ruling.

Mr. ALLEN.—That is a credit, then, upon the books of the Great Western, upon the ledger, a credit to the name of W. A. Corder of \$1,479.60?

A. Yes.

Mr. SCHLESINGER.—Same objection.

The COURT.—Same ruling. [1344]

Mr. ALLEN.—And that check is a check which is represented by the personal check of Emar Goldberg?

Mr. SCHLESINGER.—Same objection, if your Honor please.

The COURT.—Yes.

A. Same amount as charged against his bank account on this same day."

(30) The Court erred in overruling defendants' objection to the following testimony:

"Q. What reference do you find with regard to an excess delivery other than at the navy yard?

A. Government's Exhibit Number '7' states that the bid of the Fowler Metal Company was for 50,000 pounds of zinc. Government's Ex-

hibit Number '27' which is a sales sheet of the Great Western Smelting & Refining Company, page 66, show that they delivered 59,575 pounds.

Mr. VANDERVEER.—This, your Honor, is nothing but argument, and I object to it upon that ground. Counsel asked the witness to state what one thing shows, then what another thing shows, for the purpose of getting before the jury the argument which results from the comparison of two things. It isn't competent for any expert or anybody else to do that.

The COURT.—Let us proceed.

Mr. VANDERVEER.—I would like an exception.

The COURT.—Proceed. Note an exception."

(31) The Court erred in overruling defendants' objection to the following testimony:

"Mr. ALLEN.—Is there any explanation on the books of the company, so far as you could ascertain from that item or any similar item?
[1345]

Mr. SCHLESINGER.—I certainly object to that, because it is calling clearly for his conclusion. He is entitled to give his conclusion, as I understand, upon the basis of some specific figures, but he can't go over a large number of books and say the books don't show this and the books don't show that. I don't think that is material at all.

Mr. SCHLESINGER.—Exception.

The COURT.—Exception allowed.

Mr. ALLEN.—I call your attention to check 4862 out of check book of the Great Western Smelting & Refining Company. Is that a check against the account of Emar Goldberg, bonus account?

A. It so states, yes, sir; \$30.

Q. That is drawn to the Great Western Smelting & Refining Company and drawn to Emar Goldberg? A. Yes, sir.

Mr. SCHLESINGER.—This is all subject to our objection.

The COURT.—Yes, sir.

Mr. ALLEN.—What is the next check you find there?

A. 4863.

Q. By whom is that drawn and to whom?

A. Great Western Smelting & Refining Company, payable to Emar Goldberg. The stub of the check is made to Emar Goldberg, bonus account, for \$500.

Q. Who signed this check in the first instance, whose signature is that? [1346]

A. Signed by Emar Goldberg.

Q. Manager, and payable to his personal order? A. Yes, sir.

Q. Do you find any endorsement on the back with reference to anybody else handling that money? A. No, sir.

Q. What is the next item on the bonus account?

A. Government's Exhibit '73,' page 1, line 13, under date of May 4, 1908, Emar Goldberg,

bonus account, with no explanation, \$160; check No. 4892.

Q. No explanation? A. No, sir.

Q. I will ask you whether or not every other item on that page shows an explanation except that?

Mr. SCHLESINGER.—I object to the question as to no explanation. It is immaterial, incompetent and absolutely irrelevant. The books didn't require any explanation.

The COURT.—Let the witness state what the books show.

Mr. ALLEN.—That is what he is stating, your Honor, that the books don't show anything with regard to it.

The COURT.—Counsel objects to the words 'no explanation' being there.

Mr. ALLEN.—State whether there is in this book any statement there as to the character or purpose of that expenditure?

A. There is none."

(32) The Court erred in overruling defendants' objection to the following testimony:

"Q. What explanation is printed therein with reference to the purposes for which this money was expended? [1347]

Mr. SCHLESINGER.—I object to the question—

A. There is none.

Mr. SCHLESINGER.—One moment—upon the ground that the item does not require ex-

planation, and is calling for a conclusion of the witness.

The COURT.—I would ask you not to use that ‘explanation.’

Mr. ALLEN.—All right. Does that record show anything with reference to the character or purpose for which this money was expended which was drawn from Mr. Goldberg’s bonus account?

A. No, sir.

Q. Take the next item.

A. Under date of May 29, 1908, \$200. Reading from Government’s Exhibit Number ‘73,’ page 8, line 6, is an entry under date of May 29, E. Goldberg, bonus account, \$200, voucher number 4964.”

(33) The Court erred in overruling defendants’ objection to the following questions propounded to the witness J. A. Kettlewell:

“Mr. ALLEN.—Hadn’t you stated the facts regarding a number of these transactions, if not all of them, before you actually came in contact with the prosecuting officials?

Mr. SCHLESINGER.—We object to that on the ground it calls for a self-serving declaration, it is not redirect examination; it is not rebuttal, and does not tend to prove or disprove any issue here of any kind or character.

The COURT.—I think it is a proper inquiry on cross-examination as to whom the declaration was made first. Proceed.

Mr. ALLEN.—Read the question.

Q. Question repeated. A. Yes. [1348]

Q. Was your statement as made to those secret service men, was it made or coupled with any promise of any kind from any prosecuting official of the United States Government?

Mr. SCHLESINGER.—We object as calling for any opinion of the witness; it is immaterial, incompetent and irrelevant, not redirect examination, and self-serving.

The COURT.—No, I don't think so."

(34) The Court erred in denying defendants' motion for an instruction for acquittal peremptorily at the close of the Government's case.

(35) The Court erred in denying defendants' motion to strike out the various exhibits admitted in evidence bearing date subsequent to May 26, 1908, to which exceptions were duly taken.

(36) The Court erred in giving the following instruction over the objection of counsel for the defendants:

"You are instructed that every man is presumed to intend the natural and probable consequences of his voluntary acts; and if you should find that such a conspiracy as alleged in the indictment, having for its object or purpose some one or more of the objects and purposes enumerated in the indictment, existed, and that any one of the conspirators, during the life of such conspiracy, in pursuance of such conspiracy, and to effect the object thereof, set in motion any agency or power which would naturally result in the performance of any one of the overt

acts charged in the indictment, and the performance of such act in fact result therefrom, and was so performed during [1349] *during* the life of such conspiracy and to effect the object and purpose of such conspiracy, then you are instructed that such defendants intended the natural consequences, and such act would in law be the act of all of the co-conspirators irrespective of which member of the conspiracy set in motion such agency or power or performed such overt act. If you find a conspiracy was entered into between two or more of the defendants charged in the indictment, and that defendant Goldberg was a member of such conspiracy, and that Goldberg, in furtherance of such conspiracy, obtained Silverstone's endorsement on that certain check set out in the indictment and issued to the Fowler Metal Company and cashed the same at the bank, and by reason of such act the defendant Goldberg, or his company, the Great Western Smelting and Refining Company, secured the money, such act on the part of Goldberg would be the act of all of the persons who entered such conspiracy, would be an overt act to effect the object of the conspiracy, if you find beyond a reasonable doubt that a conspiracy was entered into as charged."

(37) The Court erred in making, giving and rendering judgment against the defendants for the reason that the said indictment does not state any crime or any offense against any law of the United States and for the reasons taken and assigned by the de-

defendants in their motion in arrest of judgment.

(38) The Court erred in sentencing the defendants without their being first lawfully adjudged guilty of any crime.

(39) The Court erred in pronouncing sentence of imprisonment against the said defendants. [1350]

Exceptions were duly taken to each and every of the above specified rulings.

WHEREFORE, and on account of said manifest errors, and each of them, all of which errors appear upon the record in said cause, the said defendants, EDWIN F. MEYER and EMAR GOLDBERG, pray that the decree and order of the said District Court of the United States for the Western District of Washington, be reversed.

MORRIS & SHIPLEY,

A. R. BLACK,

KERR & McCORD, and

BERT SCHLESINGER,

Attorneys for Defendants, Edwin F. Meyer and Emar Goldberg.

[Endorsed]: Assignment of Errors of Defendants Edwin F. Meyer and Emar Goldberg. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division. Mar. 24, 1914. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy. [1351]

*In the District Court of the United States, for the
Western District of Washington, Northern Division.*

No. 2039.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

EDWIN F. MEYER and EMAR GOLDBERG,

Defendants.

**Stipulation [as to Transcript of Record on Writ of
Error].**

It is hereby stipulated by and between the parties hereto through their respective attorneys:

1. That the following designated papers, together with the original citation, the original writ of error, and all of plaintiff's and defendants' exhibits, comprise all the papers, exhibits, depositions or other proceedings, which are necessary to the hearing of said cause upon writ of error in the United States Circuit Court of Appeals, and that only such papers need be included in the record of said Court:

Indictment, filed May 31, 1911.

Arraignment of defendant Meyer (June 12, 1911).

Arraignment of defendant Goldberg (June 12, 1911).

Plea of not guilty of defendant Meyer (August 11, 1911).

Plea of not guilty of defendant Goldberg (August 11, 1911).

Motion for transfer of cause, filed August 11, 1911.

Order transferring cause, September 29, 1911.

Appearance of Bert Schlesinger and Kerr & McCord
as attorneys for Goldberg, filed October 24, 1913.

Appearance of Morris & Shipley and Andrew R.
Black as attorneys for defendant Meyer, filed
October 27, 1913.

Verdict of guilty (Meyer) (filed November 12, 1913).
[1352]

Verdict of guilty (Goldberg) (filed November 12,
1913).

Journal entry of order fixing bail of each defendant
at \$5,000 (November 12, 1913).

Order giving defendants until December 22, 1913, to
file proposed bill of exceptions, filed November
22, 1913.

Journal entry of November 29, 1913, showing hearing
on motion for new trial.

Journal entry of November 29, 1913, denying motion
for new trial.

Motion in arrest of judgment, filed November 29,
1913.

Journal entry of November 29, 1913, denying motion
in arrest of judgment.

Judgment and sentence entered November 29, 1913
(against both defendants).

Order extending time for filing proposed bill of ex-
ceptions to January 22, 1914, filed December 17,
1913.

Order extending time for filing bill of exceptions to
February 22, 1914, filed January 5, 1914.

District Attorney's acknowledgment of service of
copy of proposed bill of exceptions, filed Janu-
ary 27, 1914.

Stipulation to attach original exhibits to bill of exceptions, filed January 27, 1914.

Order to attach original exhibits to bill of exceptions, filed January 27, 1914.

Stipulation filed February 11, 1914, with reference to presenting bill of exceptions to Judge.

Order extending time of District Attorney until March 10, 1914, to propose and file proposed amendments to bill of exceptions, filed February 25, 1914.

Bill of exceptions. [1353]

Petition for writ of error, filed March 24, 1914.

Order allowing writ of error, filed March 24, 1914.

Supersedeas Bond defendant Meyer, filed November 29, 1913.

Supersedeas Bond defendant Goldberg, filed November 29, 1913, together with general certificate of Illinois Surety Company.

Assignment of error, filed March 24, 1914.

Writ of error, filed March 24, 1914.

Citation, filed March 30, 1914.

Stipulation as to record and exhibits.

2. That it shall not be necessary to print the exhibits herein, but said exhibits may be attached to said record by the Clerk and forwarded to the Circuit Court of Appeals.

Dated this 30th day of March, 1914.

CLAY ALLEN,

District Attorney.

MORRIS & SHIPLEY, and

ANDREW R. BLACK,

Attorneys for Defendant Edwin F. Meyer.

KERR & McCORD,

BERT SCHLESINGER,

Attorneys for Defendant Emar Goldberg.

[Indorsed]: Stipulation. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division. Mar. 30, 1914. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy. [1354]

*In the District Court of the United States, for the
Western District of Washington, Northern Division.*

No. 2039.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

EDWIN F. MEYER, J. A. KETTLEWELL,
EMAR GOLDBERG, W. A. CORDER and
E. SILVERSTONE,

Defendants.

**Certificate of Clerk U. S. District Court to Transcript
of Record, etc.**

United States of America,

Western District of Washington,—ss.

I, Frank L. Crosby, Clerk of the United States District Court, for the Western District of Wash-

ington, do hereby certify the 1365 typewritten pages, numbered from 1 to 1365, inclusive, to be a full, true, correct and complete copy of so much of the record, papers and other proceedings in the above and foregoing entitled cause as are necessary to the hearing of said cause on Writ of Error therein in the United States Circuit Court of Appeals for the Ninth Circuit, and as is stipulated for by counsel of record herein, as the same remain of record and on file in the office of the Clerk of said District Court, and that the same, together with the original plaintiff's and defendants' exhibits introduced in evidence and submitted to the jury are transmitted pursuant to the order of Court so directing, constitute the record on return to said Writ of Error herein from the judgment of said United States District Court for the Western District of Washington, to the United States Circuit Court of Appeals for the Ninth Circuit. [1355]

I further certify the following to be a full, true and correct statement of all expenses, costs, fees and charges incurred and paid in my office by or on behalf of the plaintiffs in error for the preparation and certification of the typewritten transcript of record issued to the United States Circuit Court of Appeals for the Ninth Circuit in the above-entitled cause, to wit:

Clerk's fee (Sec. 828 R. S. U. S., as
Amended by Sec. 6, Act of March 2,
1905) for making transcript of the rec-
ord for printing purposes—3520 folios
30c per folio\$1,056.00

Certificate of Clerk to typewritten transcript of record—4 folios	1.20
Seal to said certificate40
Certificate of Clerk to original exhibits—2 folios60
Seal to said certificate40
<hr/>	
	\$1,058.60

I further certify that the above cost for preparing and certifying record amounting to \$1,058.60 has been paid to me by counsel for Plaintiffs in Error.

IN WITNESS WHEREOF I have hereto set my hand and affixed the seal of said District Court at Seattle, in said District, this 23rd day of April, 1914.

[Seal]

FRANK L. CROSBY,
Clerk U. S. District Court. [1356]

In the District Court of the United States, for the Western District of Washington, Northern Division.

No. 2039.

UNITED STATES OF AMERICA

vs.

EDWIN F. MEYER and EMAR GOLDBERG,
Defendants.

Writ of Error [Copy].

The President of the United States of America, to the Honorable the Judges of the District Court of the United States, for the Western District of Washington, Greeting:

Because, in the record and proceedings, as also in

the rendition of the judgment of a plea which is in the said District Court before you, or some of you, between Edwin F. Meyer and Emar Goldberg, plaintiffs in error, and the United States of America, defendant in error, a manifest error hath happened, to the great damage of the said Edwin F. Meyer and Emar Goldberg, plaintiffs in error, as by their complaint appears:

We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice be done to the parties aforesaid in this behalf, do command you, if judgment be therein given, and then, under your seal, distinctly and openly you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals, for the Ninth Circuit, together with this Writ, so [1357] that you have the same at the city of San Francisco, in the State of California, within thirty days from date hereof, in the said Circuit Court of Appeals, to be then and there held, that, the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

WITNESS, the Honorable Chief Justice of the United States, the 24th day of March, in the year of

1492 *Edwin F. Meyer and Emar Goldberg*

our Lord one thousand, nine hundred and thirteen.

FRANK L. CROSBY,

Clerk of the United States District Court, Western
District of Washington, Northern Division.

By Ed M. Lakin,
Deputy Clerk.

Allowed by:

JEREMIAH NETERER,
Judge.

[Indorsed]: No. 2039. In the District Court of the United States for the Western District of Washington, Northern Division, United States of America vs. Edwin F. Meyer and Emar Goldberg. Writ of Error. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division. Mar. 24, 1914. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy. Bert Schlesinger, Claus Spreckles Building, San Francisco, Cal. [1358]

*In the District Court of the United States, for the
Western District of Washington, Northern Division.*

No. 2039.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

EDWIN F. MEYER and EMAR GOLDBERG,
Defendants.

Citation [on Writ of Error (Copy)].

By the Hon. JEREMIAH NETERER, Judge of the District Court of the United States, for the Western District of Washington, Northern Division, to the United States of America:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the Ninth Circuit at the city of San Francisco, in the State of California, within thirty days from date hereof, pursuant to an order and writ of error filed in the clerk's office of the District Court of the United States, for the Western District of Washington, wherein Edwin F. Meyer and Emar Goldberg, are plaintiffs in error, and United States of America is defendant in error; and you are to show cause, if any there be, why the judgment rendered against said plaintiffs in error, and each of them, as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Given under my hand at the city of Seattle, in the Western District of Washington, and in the Northern Division thereof, this 30th day of March, 1914.

[Seal]

JEREMIAH NETERER,

Judge of the District Court of the United States, for the Western District of Washington. [1359]

Due service of the within Citation by delivery of a copy to the undersigned is hereby acknowledged this

30th day of March, 1914.

CLAY ALLEN,

U. S. District Attorney for Western District of
Washington, Attorney for United States of
America.

[Indorsed]: No. 2039. In the District Court of
the United States, for the Western District of Wash-
ington, Northern Division. United States of
America, Pltf., vs. Edwin F. Meyer and Emar Gold-
berg, Defts. Citation. Filed in the U. S. District
Court, Western Dist. of Washington, Northern Divi-
sion. Mar. 30, 1914. Frank L. Crosby, Clerk. By
Ed M. Lakin, Deputy. [1360]

*In the District Court of the United States, for the
Western District of Washington, Northern Divi-
sion.*

No. 2039.

UNITED STATES OF AMERICA

vs.

EDWIN F. MEYER and EMAR GOLDBERG,
Defendants.

Writ of Error [Original].

The President of the United States of America, to the
Honorable the Judges of the District Court of
the United States, for the Western District of
Washington, Greeting:

Because, in the record and proceedings, as also in
the rendition of the judgment of a plea which is in
the said District Court before you, or some of you,
between Edwin F. Meyer and Emar Goldberg, plain-

tiffs in error, and the United States of America, defendant in error, a manifest error hath happened, to the great damage of the said Edwin F. Meyer and Emar Goldberg, plaintiffs in error, as by their complaint appears:

We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice be done to the parties aforesaid in this behalf, do command you, if judgment be therein given, and then, under your seal, distinctly and openly you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals, for the Ninth Circuit, together with this Writ, so [1361] that you have the same at the city of San Francisco, in the State of California, within thirty days from date hereof, in the said Circuit Court of Appeals, to be then and there held, that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

WITNESS, the Honorable Chief Justice of the United States, the 24th day of March, in the year of our Lord one thousand, nine hundred and fourteen.

FRANK L. CROSBY,

Clerk of the United States District Court, Western
District of Washington, Northern Division.

By Ed M. Lakin,
Deputy Clerk.

Allowed by:

JEREMIAH NETERER,

Judge. [1362]

[Endorsed]: No. 2039. In the District Court of the United States for the Western District of Washington, Northern Division. United States of America vs. Edwin F. Meyer and Emar Goldberg. Writ of Error. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division. Mar. 24, 1914. Frank L. Crosby, Clerk. By Ed M. Lakin, Clerk. [1363]

*In the District Court of the United States, for the
Western District of Washington, Northern Division.*

No. 2039.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

EDWIN F. MEYER and EMAR GOLDBERG,
Defendants.

Citation [on Writ of Error (Original)].

By the Hon. JEREMIAH NETERER, Judge of the District Court of the United States, for the Western District of Washington, Northern Division, to the United States of America:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the Ninth Circuit at the city of San Francisco, in the State of California, within thirty days from date hereof, pursuant to an order and writ of error filed in the clerk's office of the District Court of the United States, for the Western District of Washington, wherein Edwin F. Meyer and Emar Goldberg,

are plaintiffs in error, and United States of America is defendant in error; and you are to show cause, if any there be, why the judgment rendered against said plaintiffs in error, and each of them, as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Given under my hand at the city of Seattle, in the Western District of Washington, and in the Northern Division thereof, this 30th day of March, 1914.

[Seal] JEREMIAH NETERER,

Judge of the District Court of the United States, for the Western District of Washington. [1364]

Due service of the within Citation by delivery of a copy to the undersigned is hereby acknowledged this 30th day of March, 1914.

CLAY ALLEN,

U. S. District Attorney for Western District of Washington,

Attorney for United States of America.

[Endorsed]: No. 2039. In the District Court of the United States for the Western District of Washington, Northern Division. United States of America, Plff., vs. Edwin F. Meyer and Emar Goldberg, Defts. Citation. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, Mar. 30, 1914. Frank L. Crosby, Clerk. Ed M. Lakin, Deputy. [1365]

[Endorsed]: No. 2413. United States Circuit Court of Appeals for the Ninth Circuit. Edwin F. Meyer and Emar Goldberg, Plaintiff in Error, vs.

United States of America, Defendant in Error.
Transcript of Record. Upon Writ of Error to the
United States District Court of the Western District
of Washington, Northern Division.

Received and filed April 27, 1914.

FRANK D. MONCKTON,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Meredith Sawyer,
Deputy Clerk.

*In the United States Circuit Court of Appeals for
the Ninth Circuit.*

No. 2039.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

EDWIN F. MEYER, J. A. KETTLEWELL,
EMAR GOLDBERG, W. A. CORDER and
E. SILVERSTONE,

Defendants.

Order Enlarging Return Day [to March 2, 1914].

On motion of the attorneys for defendants Edwin
F. Meyer and Emar Goldberg, and good cause ap-
pearing therefor,—

IT IS ORDERED that the return day mentioned
in the Citation on Writ of Error in said cause be, and
the same is hereby, enlarged to and including the 2d
day of March, 1914.

Dated Jany. 24, 1914.

WM. W. MORROW,
Judge.

[Endorsed]: No. 2413. In the United States Circuit Court of Appeals, for the Ninth Circuit. The United States of America vs. Edwin F. Meyer, J. A. Kettlewell, Emar Goldberg, W. A. Corder and E. Silverstone, Defendants. Order Enlarging Return Day. Filed Jan. 24, 1914. F. D. Monckton, Clerk. Refiled Apr. 27, 1914. F. D. Monckton, Clerk.

In the United States Circuit Court of Appeals, Ninth Circuit.

No. 2039.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

EDWIN F. MEYER and EMAR GOLDBERG,

Defendants.

Order Extending Return Day [to May 30, 1914].

Good cause appearing therefor, on motion of BERT SCHLESINGER, one of the attorneys for said defendants.

IT IS ORDERED, that the return day of the citation issued in the above-entitled cause be and it is hereby extended to and including the 30th day of May, 1914.

April 28, 1914.

WM. W. MORROW,
Judge.

1500 *Edwin F. Meyer and Emar Goldberg*

[Endorsed]: No. 2413. In the United States Circuit Court of Appeals, Ninth Circuit. United States of America, Plaintiff, vs. Edwin F. Meyer and Emar Goldberg, Defendants. Order Extending Time. Filed Apr. 28, 1914. F. D. Monckton, Clerk.

2
No. 2413.

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT.

EDWIN F. MEYER and
EMAR GOLDBERG,

Plaintiffs in Error,

vs.

THE UNITED STATES OF AMERICA,

Defendant in Error.

Opening Brief of Plaintiffs in Error.

KERR & McCORD,
BERT SCHLESINGER,
MORRIS & SHIPLEY,
A. R. BLACK,
Attorneys for Plaintiffs in Error.

Filed this.....day of September, A. D., 1914.

FRANK D. MONCKTON, Clerk.

By.....Deputy Clerk.

THE TEN BOSCH COMPANY, SAN FRANCISCO

Filed

OCT 2 - 1914

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

EDWIN F. MEYER and	}	No. 2413
EMAR GOLDBERG,		
<i>Plaintiffs in Error,</i>		
vs.		
THE UNITED STATES OF	}	
AMERICA,		
<i>Defendant in Error.</i>		

BRIEF FOR APPELLANTS.

The plaintiffs in error, Edwin F. Meyer and Emar Goldberg, were convicted of an alleged violation of section 5440 of the Revised Statutes. The judgment of the Court ordered that each of the plaintiffs in error be imprisoned for the term of fifteen months, and pay a fine each in the sum of Two Thousand (\$2000.00) Dollars.

The claims which will be urged by the plaintiffs in

error and which are covered by proper exceptions and assignments of error are as follows:

I.

THE COURT ERRED IN REFUSING TO DIRECT THE JURY TO RETURN A VERDICT OF "NOT GUILTY" FOR THE REASON THAT THE ALLEGED VIOLATION OF SECTION 5440 OF THE REVISED STATUTES WAS COMPLETED ON THE 26TH DAY OF MAY, 1908, AND THE INDICTMENT WAS NOT PRESENTED UNTIL THE 31ST OF MAY, 1911.

A large number of requests for peremptory instructions as well as for a motion to dismiss were submitted to the court. See Assignments of Error, Nos. 1, 2, 3, 4, 5, 6, 7, 8, and 9, Trans., pp. 1450 to 1453, inclusive.

The same requests will be found in the instructions requested by the defendants and refused by the court. Trans., 1429-1433, inclusive.

"I advise your returning a verdict of not guilty as to the defendant Emar Goldberg, as the evidence introduced by the Government is insufficient to warrant a verdict of not guilty. (Trans., p. 1430.)

* * * * *

"I advise you to return a verdict of not guilty as to Emar Goldberg as the evidence conclusively shows that the last overt act occurred more than three years before the filing of the indictment herein. (Trans., p. 1430.)

"I charge you to return a verdict of not guilty as to the defendant Emar Goldberg for the reason that the alleged violation of section 5440 (Revised Statutes of United States) was committed and completed on the 26th day of May, 1908, and the indictment in this case was not presented until the 31st day of May, 1911. (Trans., p. 1430.)

* * * * *

"I charge you to return a verdict of not guilty as to the defendant Emar Goldberg, as the undisputed facts show that no overt act to effect the objects of the alleged conspiracy occurred within the period limited by section 1044 (Revised Statutes of United States).

* * * * *

"I charge you that the alleged defense in this case was ended on the date of delivery of the check in question, to wit, on the 26th day of May, 1908, and was barred by the statute of limitation on the 26th day of May, 1911. (Trans., p. 1431.)

* * * * *

"I charge you before you can return a verdict of guilty you must find that an overt act occurred within three years of the filing of the indictment herein. In this connection, I charge you that an overt act is an act done to effect the objects of the conspiracy; settlements between the alleged conspirators or with agents for profits, are not overt acts. (Trans., p. 1431.)

"I charge you that under the laws of the United States, an indictment charging an offense, to wit, a conspiracy to defraud the United States, must be presented within three years from the time of the commission of the offense, and if you find from the evidence in this case, that the indictment presented herein was not presented within three years from the date of the commission of the offense, or if you have a reasonable doubt, then it would be your bounden duty to return a verdict of not guilty. (Trans., p. 1432.)

* * * * *

"I charge you that if you have a reasonable doubt as to whether or not the alleged offense here complained of, was committed within three years of the time of the presentment of the indictment herein, it would be your duty as sworn jurors to give the defendant the benefit of such doubt and return a verdict of not guilty. (Trans., p. 1432.)

* * * * *

"I charge you that the defendant is entitled to interpose any defense allowed him by the law, and this includes the defense of the Statute of Limitations, and you should not be prejudiced against the defendant in the course of such defense; and I further charge you before you can find the defendant guilty, you must find from the evidence beyond all reasonable doubt, that the offense, if committed, occurred within three years from the date of filing of indictment herein. (Trans., p. 1432.)

- A. The conspiracy ended with the delivery of the check to the plaintiffs in error on May 26, 1908,

which was more than three years prior to the filing of the indictment.

- (1) The testimony shows that May 26th, 1908, was the date of the delivery of the check.
- (2) All acts subsequent to May 26, 1908, were private arrangements between the parties to the conspiracy, all subsequent use of the check whether by depositing same or cashing same, had nothing to do with the substantive offense.

B. The statute of limitations runs from the date of payment by check.

C. After May 26th, 1908, the conspiracy ceased to be a continuing offense; and became a completed conspiracy with a continuing result.

- (1) The object of the conspiracy, even conceding that it was the receipt of the check, was effected on May 26th, 1908, the date of the delivery thereof to the defendants.
- (2) The distinction between a continuing offense and a completed offense with a continuing result is well illustrated by the cases herein cited and quoted from.
- (3) The retention of the check from May 26th to June 2, 1908, could not continue the crime.
- (4) But the real object of the conspiracy as expressed in the indictment itself, was to

suppress bidding and enable the plaintiffs in error to secure the award, and that object was effected long prior to the 26th of May, 1908.

- (5) The substantive offense was completed with the acquisition of the check by the defendants.
- (6) The last overt act must have occurred prior to the receipt of the check, for the overt act cannot succeed the completion of the contemplated crime.

D. According to the terms of the indictment, and of all rules of common sense, the object of the conspiracy was attained by the receipt of the check, because the check constituted payment, and no further relations with the Government were necessary after its delivery.

E. There is no dispute as to the date of delivery of the check, although the indictment charged this date as on or about June 1st, 1908, the evidence both of the Government and defendant showed that it occurred on May 26th, 1908.

II.

THE COURT COMMITTED PREJUDICIAL ERROR IN OVERRULING THE PERSISTENT OBJECTIONS OF THE PLAINTIFFS IN ERROR TO EVIDENCE AS TO SALES OF ZINC AT VARIOUS TIMES TO VARIOUS PURCHASERS, FOR THE PURPOSE OF ESTABLISHING THE REASONABLE VALUE OF THE ZINC SOLD TO THE GOVERNMENT.

- A. It was not shown by the government that the other sales offered by it in evidence took place under the same conditions or were subject to the same circumstances as the sale of the zinc in question. On the contrary the conditions and circumstances were shown by the evidence to be fundamentally different.
- B. Mr. House, by whom this testimony was produced, was an expert accountant, and was not an expert in or competent to testify as to the market value of zinc.

III.

THE EVIDENCE IS INSUFFICIENT TO JUSTIFY THE CONVICTION.

A

THE INDICTMENT.

DUTIES OF MR. MEYER.

The indictment was presented and filed in the United States Circuit Court for the western district of Washington, western division, on May the 31st, 1911. It charges that on the 2nd day of June, 1908, and for a long time prior thereto, the plaintiff in error, Edwin

F. Meyer, was principal clerk in the office of the general store keeper of the United States Navy Yard at Puget Sound, Washington. That pursuant to certain rules and regulations he was vested with sundry powers, duties and discretions, in determining from time to time the minimum amount of supplies of various kinds and descriptions which should be kept on hand at Puget Sound for use at the navy yard; in proposing and recommending from time to time the purchase of various kinds of supplies; in suggesting and issuing requisitions for the purchase thereof; in recommending the approval of such requisitions by superior officers; in suggesting the estimated cost of supplies specified in requisitions; in suggesting and fixing the time designated in the requisitions within which the successful bidder would be required to deliver such supplies; and in giving out information regarding requisitions and recommending the acceptance or rejection of such supplies by the storekeeper in charge.

DUTIES OF MR. KETTLEWELL.

That on the 2nd day of June, 1908, and for a long time prior thereto, one J. A. Kettlewell was chief clerk to the Navy Pay Officer at Seattle, Washington, and pursuant to certain rules and regulations he was vested with sundry powers and discretions, and among others with the power, duty and discretion in suggesting the disposal of, and disposing of the requisitions for sup-

plies received from the store keeper of the Navy Yard at Puget Sound; in giving notice to the public that competitive proposals and bids would be received by the pay master of the United States at Seattle, Washington, for the purchase of supplies for the store keeper, and the preparation of and sending out to the public of proposals containing specifications of the supplies covered by such requisitions; in suggesting and devising ways and means of receiving bids and proposals; in recommending the award of contracts to successful bidders; in suggesting the approval or rejection of accounts rendered by such successful bidder, as such account should be fair and honest or false and fraudulent; in suggesting and recommending *the payment or non-payment of such amounts so claimed by such successful bidder to be due him for such supplies furnished, according as such claim should be fair and honest or false and fraudulent*; IN SUGGESTING AND CAUSING TO BE ISSUED, MAILED AND DELIVERED, AND IN ISSUING, MAILING AND DELIVERING, TO THE SUCCESSFUL BIDDER, THE CHECK OF THE PAY MASTER OF THE UNITED STATES NAVY PAY OFFICE AT SEATTLE, WASHINGTON, IN PAYMENT OF THE CLAIM OF SUCH SUCCESSFUL BIDDER, FOR SUPPLIES SO FORWARDED TO THE STORE KEEPER AT THE NAVY YARD AT PUGET SOUND, WASHINGTON.

AVERMENTS AS TO GOLDBERG.

That on the 2nd day of June, 1908, and for a long time prior thereto, Goldberg was a resident of Seattle, and manager of the Seattle branch of the Great Western Smelting & Refining Company, a corporation having offices in San Francisco, Chicago, Seattle, Los Angeles, and various other cities, such branch being engaged in the business of buying and selling iron, tin, zinc, and kindred articles.

AVERMENTS AS TO W. A. CORDER.

That on the 2nd day of June, 1908, Corder was a resident of Seattle, and was the manager of a mercantile business operating under the firm name and style of W. A. Corder & Company, engaged in the business of buying and selling machinery supplies.

AVERMENTS AS TO SILVERSTONE.

That on the 2nd day of June, 1908, one E. Silverstone was a resident of Seattle, Washington, and was engaged in conducting a hotel known as the "Herald," located in Seattle.

AVERMENTS OF CONSPIRACY.

That on or about THE SECOND DAY OF JUNE, 1908, EDWIN F. MEYER AND J. A. KETTLEWELL DID UNLAWFULLY AND MALICIOUSLY CONSPIRE WITH SAID EMAR GOLDBERG, W. A. CORDER AND E.

SILVERSTONE TO DEFRAUD THE UNITED STATES OF DIVERS LARGE SUMS OF MONEY BY MEANS OF A CERTAIN FRAUDULENT SCHEME, DEVISED BY SAID MEYER, KETTLEWELL, GOLDBERG, CORDER AND SILVERSTONE, AND WAS THEN AND THERE IN PROCESS OF EXECUTION BY THEM; THAT SAID FRAUDULENT SCHEME WAS, AS DEVISED BY SAID DEFENDANTS, ON OR ABOUT THE FIRST DAY OF APRIL, 1908, IN PROCESS OF EXECUTION, AND WAS CONTINUOUSLY IN PROCESS OF EXECUTION FROM SAID FIRST DAY OF APRIL TO AND INCLUDING THE SECOND DAY OF JUNE, 1908, and was thereafter in process of execution by said defendants in their acts tending to effect the object of the conspiracy.

That the said fraudulent scheme contemplated that, as the said Great Western Smelting and Refining Company had on hand on, to-wit: THE FIRST DAY OF APRIL, 1908, A LARGE STOCK OF ZINC, THE SAID MEYER SHOULD, WITH FRAUDULENT INTENT, CAUSE TO BE ISSUED BY THE UNITED STATES NAVY YARD A REQUISITION FOR THE PURCHASE FOR USE AT SAID YARD OF A LARGE QUANTITY OF ZINC, etc., and should place in said requisition, as the estimated cost price of said zinc, a price in excess of

the fair market value of the same, and should place in the requisition as the time in which the successful bidder should deliver the said zinc to said Navy Yard, so short a time of delivery that only merchants in Seattle could comply with the requirements, and so that only merchants of Seattle would be able to furnish the same, and would be unable to enter into competition for the contract; and should, with like fraudulent intent, so draft the specifications contained in the requisition as to the kind and quality of said zinc, etc., that only the Great Western Smelting & Refining Company and the said W. A. Corder Company could comply with the requirements.

That from time to time the said Meyer should notify the plaintiffs in error of the progress of such requisition so that they would be able to prevent legitimate competition.

That Silverstone, without authority so to do, should ostensibly represent the Fowler Metal Company, but actually represent the Great Western Smelting & Refining Company and said W. A. Corder Company, and should at the proper time file with the United States Navy Yard a proposal and bid to furnish at prices in excess of the market value, the said zinc, etc., so to be requisitioned for use at the Navy Yard, purporting to be the proposal and bid of the Fowler Metal Company, but to be in reality the bid of Silverstone, and for the Great Western Smelting & Refining Company and the W. A. Corder Company; that when said requisition

should reach the United States Navy Pay Office, said Kettlewell should send out proposals containing specifications of the articles so desired to be purchased for use at the Navy Yard, to a list of merchants in Seattle, which lists should contain the names of no other merchants than the Great Western Smelting & Refining Company, W. A. Corder & Company, and the Fowler Metal Company, except the names of such merchants known by said Kettlewell to be unable to furnish the articles.

Said Kettlewell should, with fraudulent intent, examine the bids so thereafter to be received at the United States Navy Office, and should ascertain whether or not, in fact, any merchants other than the Great Western Smelting & Refining Company, the Corder Company or the Fowler Metal Company had bid thereon, and if so, to manipulate and order such other bids so that the contract should be awarded to the Great Western Smelting & Refining Company, the W. A. Corder Company, or the Fowler Metal Company.

Said Kettlewell should recommend to the paymaster of the United States Navy Pay Office, and arrange to have accepted, the bid or proposal of the Fowler Metal Company, to be offered and filed by Silverstone; should arrange to have awarded to said Fowler Metal Company the contract for the furnishing of said zinc; that Meyer should arrange to have the zinc which would be forwarded to the United States Navy Yard by said Great Western Smelting & Refining Company and the W. A. Corder Company in fulfillment of the Fowler

Metal Company's contract ACCEPTED WITHOUT QUESTION AND SAID KETTLEWELL SHOULD RECOMMEND AND SECURE THE APPROVAL OF THE ACCOUNT AS SHOWN BY A CERTAIN CERTIFIED BILL TO BE FILED BY SAID SILVERSTONE WITH THE UNITED STATES NAVY YARD AT PUGET SOUND, WASHINGTON, PURPORTING TO BE THE CERTIFIED BILL OF THE FOWLER METAL COMPANY, SHOWING DELIVERY OF THE SAID ZINC AND ACCEPTANCE OF SAME AT THE SAID NAVY YARD, AND SHOULD THEREUPON RECOMMEND AND SECURE THE ISSUANCE BY THE PAYMASTER OF THE UNITED STATES NAVY PAY OFFICE AT SEATTLE, WASHINGTON, OF A CHECK PAYABLE TO THE ORDER OF SAID FOWLER METAL COMPANY, FOR THE AMOUNTS APPEARING TO BE DUE THE SAID FOWLER METAL COMPANY, ACCORDING TO THE ACCOUNT RENDERED, AND SHOULD ARRANGE TO HAVE THE CHECK DELIVERED TO SAID E. SILVERSTONE OR SAID GOLDBERG.

It is then averred that the object and purpose of the conspiracy was that the said Meyer and Kettlewell should so exercise their powers that there should be no real competition on the contract to supply said zinc, but that the contract should be obtained by either the

Great Western Smelting & Refining Company or the Fowler Metal Company, but secretly for the benefit of the Great Western Smelting & Refining Company and W. A. Corder & Company.

It is further stated that the object and purpose of the conspiracy was that the United States should pay for the said zinc, rolled sheets and boiler plates an amount greatly in excess of its real value, and said conspirators should obtain for themselves an unreasonable profit from the sale of said zinc and said unreasonable profits so realized should be divided amongst them in proportions to the Grand Jurors unknown.

AVERMENTS OF OVERT ACTS.

Then follow the averments of overt acts.

1. That on or about the 1st day of June, 1908, said Kettlewell delivered to Emar Goldberg a certain check in words and figures following, to-wit:

	"No. 82	U. S. Navy Pay Office,
		Seattle, Washington, May 26th, '08.
United States		The Seattle National Bank, Seattle,
Depository.		Washington.
		United States Depository.
State Object	Pay to Fowler Metal Co. or	{ order
		{ bearer
for which	Seventy-four Hundred and Seven-	
Drawn	teen 09/100 Dollars (\$7,417.09).	
Zincs. 1725		

ROBERT H. ORR,
Paymaster, U. S. N."

2. That on or about the 1st day of June, 1908, said Kettlewell delivered to Silverstone the same check.

3. That on or about the 1st day of June, 1908, Emar Goldberg had in his possession the same check, and did, with fraudulent intent, write upon the back thereof: "Pay to the order of E. Silverstone, FOWLER METAL COMPANY, per E. S. Fowler, Treasurer and Manager."

4. That on or about the 1st day of June, 1908, so having said check in his possession, said Emar Goldberg did knowingly cause to be delivered to one E. Silverstone the said check.

5. That on or about the 1st day of June, 1908, the said E. Silverstone so having the said check in his possession, did write upon the back of said check an endorsement: "E. Silverstone."

6. That on or about the 1st day of June, 1908, said E. Silverstone, so having said check in his possession, did deposit it in the First National Bank to his credit.

7. That on or about the first day of June, 1908, said Silverstone did issue a check on the First National Bank to the order of the Great Western Smelting & Refining Company in the sum of \$7,417.09, and delivered it to Emar Goldberg.

8. That on or about the 1st day of June, 1908, said Emar Goldberg had in his possession the said last named check and so having it in his possession, did endorse on the back of the check the name of the Great Western Smelting & Refining Company, and did deposit the said

check to the credit of the Great Western Smelting & Refining Company, in the National Bank of Commerce of Seattle.

This, we submit, is an accurate analysis of the substantial averments of the indictment, including the overt acts. It will be observed that the indictment in this case was not filed until May 31st, 1911.

It will also be observed that the pleader has fixed the time of the alleged conspiracy as "on or about the second day of June, 1908," and has fixed the date of the delivery of the check of the Government as "on or about the first day of June, 1908."

B

STATEMENT OF FACTS.

The evidence in this case upon which the defendants have been convicted is almost solely that of the witness, J. A. Kettlewell. The defendants' case rests solely upon the testimony of the defendant Edwin F. Meyer and the defendant Emar Goldberg. A presentation of the evidence of Kettlewell and a presentation of the evidence of the defendants Goldberg and Meyer will bring to the court's attention all the necessary facts in this case.

TESTIMONY OF J. A. KETTLEWELL.

The evidence of the witness J. A. Kettlewell, upon

which, as has been stated above, the prosecution depends for its support of the verdict in this case is as follows:

DIRECT EXAMINATION.

On direct examination, for the United States, it appears that the said J. A. Kettlewell was indicted with the other defendants, pleaded guilty, and received a pardon in this case so as to permit him to testify. He became associated with the Puget Sound Navy Yard in 1902. (Trans., p. 314.) Remained at the Puget Sound yard until about December, 1906, and in December, 1906, withdrew from the Puget Sound Navy Yard and became associated with the Paymaster's Department of the Government, at Seattle, and remained in the Paymaster's department until March 28, 1911. (Trans., p. 314.) On or about March 28th, 1911, he entered the Navy Pay Office in Seattle under Paymaster Orr.

DUTIES AS CHIEF CLERK TO PAYMASTER.

The duties of Kettlewell as chief clerk included the general supervision of the office, and as chief clerk he served under various paymasters. (Trans., p. 315.) He continued in the office until the time of his arrest as chief clerk of the paymaster. He further testified that he was thoroughly familiar with the storekeeper's office at Bremerton, and with the general routine that followed in the preparation of requisitions, and was thoroughly familiar with all matters connected with

bidding for supplies for the navy. (Trans., p. 320.) Amongst his duties as chief clerk to the paymaster, he was to examine requisitions; that all proposals for bids were sent out by said Kettlewell as clerk, by himself directly, or under his supervision.

DEALINGS BETWEEN GOLDBERG AND KETTLEWELL.

Kettlewell further testified that Meyer stated to him that Goldberg would "make it right" if he got any business, but that until the first part of 1908 Goldberg had not "made it right" with him. That the said Kettlewell continuously complained that Goldberg had not settled with him, and that on or about the 11th day of January he refused a voucher for an excessive amount of zinc. (Trans., p. 270.) That shortly thereafter a requisition was issued for 4000 pounds of zinc, and the same was passed, and the voucher paid therefor. Check was issued and delivered to the Great Western Smelting and Refining Company. Thereafter Kettlewell again complained to Meyer that Goldberg had not settled with him, and three or four days thereafter Goldberg came to Kettlewell's office and handed him \$100, saying, "This will straighten old matters up and that Meyer is going to make a big requisition as soon as he can, and I want everything straightened up before that comes through." (Trans., p. 278.) And that he would be willing to divide on the basis of twenty per cent to Meyer and twenty per cent to Kettlewell.

Mr. Kettlewell further testified that shortly after he

had been given the \$100 by Goldberg a requisition was issued for 50,000 pounds of zinc, requisition No. 438, Navy Yard of Puget Sound for 1/2 by 6 by 12 plate. When he received this requisition he telephoned to Mr. Goldberg and told him it was agreed he should hold it a couple of days before sending it out. Meanwhile the proposals were made out. Mr. Goldberg stated that there was another party who he desired to bid on this requisition—that he did not desire to split up the profits with half a dozen people, but was unable to give the identity of the bidder at the time. Later a party came to the office, representing the Fowler Metal Company, and asked for a set of proposals to submit and bid on this zinc. A set of proposals was mailed direct to W. A. Corder Company and others.

PROPOSALS AND BIDS FOR THE REQUISITION IN QUESTION.

Proposals were taken to P. McManus, Pacific Engineering Company, Schwabacher Hardware Company, Union Sound Machinery Depot, Seattle Hardware Company, and Hallidie Machinery Company. To all of these dealers attention was particularly directed by Kettlewell to the fact that it must be furnished within five days and the dealers said that they could not furnish it within that time. The bids received in reply to proposals for requisition No. 438 were: Fowler Metal Company, put in by Mr. Silverstone; Great Western Smelting and Refining Company, signed by

Emar Goldberg. All these were dated April 11th. The American Iron & Metal Company also made a bid, a proposal having been mailed to them by the witness, at the request of Mr. Goldberg. The Fowler Metal Company bid \$12.45 per hundred weight, and were the successful bidders; the Great Western Smelting & Refining Company being next, having bid 12½ cents per pound. Some of the other companies bid, but the other bids were put in at Kettlewell's suggestion. Mr. Corder protested against the award being made to the Fowler Metal Company, saying: "That man does not represent the Fowler Company or anybody else but Jimmie (Goldberg)."

TESTIMONY THAT CHECK WAS DELIVERED ON

MAY 26, 1908.

The witness stated that the check came through in the usual course and A CHECK WAS ISSUED THEREFOR ON MAY THE 26TH, 1908, AND DELIVERY OF THIS CHECK TO GOLDBERG OCCURRED ON THE SAME DAY, TO-WIT: MAY THE 26TH, 1908. (Trans., pp. 306, 307.) Some time thereafter Kettlewell was given \$350, as part profit of the zinc transaction. It further appears, (Trans., p. 312), that the requisition No. 438, as it came over from the Navy Yard, called for delivery within fifteen days, whereas the proposals called for delivery within five days, and that the change was made by Kettlewell at the suggestion of Mr. Goldberg.

CROSS-EXAMINATION.

Under cross-examination it appears from the statements of the witness that the said Kettlewell was practically in entire charge of the office of the Paymaster at Seattle; that on numerous occasions long prior to having met Goldberg the said Kettlewell changed and altered bids of merchants submitted for various supplies, and after they were changed they were submitted to the paymaster, such changes always being made by Kettlewell very slowly and carefully in order to disguise his handwriting.

HE FREQUENTLY CHANGED BIDS.

The witness stated that he frequently changed bids. "There is no question about that." (Trans., p. 327.) It appears that the present special attorney was the attorney for the witness Kettlewell, approximately seven indictments having been brought by the grand jury against the said Kettlewell.

HE OPERATED UNDER THE NAMES OF NUMEROUS FICTITIOUS CONCERNS OF WHICH THE OTHER DEFENDANTS WERE TOTALLY IGNORANT.

The witness Kettlewell pleaded guilty to an indictment charging him with defrauding the government in what is known as the "Peter Brandt transaction;" he pleaded guilty to an indictment charging him with defrauding the government in what is known as the "Smith-Hunt Transaction;" Smith-Hunt & Co. being

a fictitious concern under which name, he, Kettlewell, operated; that he also pleaded guilty to an indictment charging him with defrauding the government in what is known as the "Lyman-Evans Transaction." From this last named transaction he received the sum of \$1,012.70. The witness further testified as to a transaction having occurred while he was chief clerk of the Paymaster's office, in relation to a bid that had been submitted by Miles Piper & Co., which the witness raised and passed up to the chief paymaster thereafter. (Trans., pp. 334, 335, 337.) He further stated that there was no such firm as "Lyman-Evans and Company," and that it was solely fictitious. (Trans., pp. 393, 394.) That each and every transaction that took place between the witness Kettlewell and Lyman-Evans & Company was a fraudulent transaction. That after the said Kettlewell had placed a requisition, the said Kettlewell in his official capacity issued proposals to numerous persons for the supply thereof, and thereafter put in a proposal as a representative of Lyman-Evans and Company; thereafter said proposal was awarded to said Lyman-Evans and Company, a fictitious firm, standing solely for the witness Kettlewell, and that the said witness thereafter received from the government through the fictitious Lyman-Evans and Company the money in payment of said supplies.

HE OPENED THE BIDS OF OTHER COMPANIES.

It appears from the witness' statements that he

opened bids, of other firms, who were bidding against him, in order to underbid them. (Trans., p. 398.) That he borrowed \$155 from the defendant Meyer shortly after he entered the government service in 1902, and that he gave the said Meyer a note for the sum, which note, he testified, had been destroyed, but it appears that the said note had never been destroyed. (Trans., p. 401.) The same facts testified to as having occurred in the Lyman-Evans transaction, occurred also in the Smith-Hunt transaction, in which the witness Kettlewell sold from himself to the government two thousand feet of single chain, although the requisition called for only one thousand feet. (Trans., p. 405.) These transactions occurred quite often. All letters relating to these fictitious concerns and transactions were addressed to the place of residence of Mr. Kettlewell's sister. It further appears that the witness never obtained permission from the government to enter into competition for sales of supplies to the government. (Trans., p. 414.) Also that the witness never conferred with Mr. Goldberg about creating the firm of Lyman-Evans & Co., or Smith-Hunt and Company, nor did he consult Mr. Goldberg when the said Kettlewell transacted business with the government under the name of Peter Brandt, and at no time consulted with Mr. Goldberg about the sale of supplies to the government under the names of these various fictitious concerns, the creation of the witness Kettlewell. It further appears that he never disclosed to any merchant in Seattle that he

was engaged in furnishing the Government with supplies, nor that he was competing with them in government business, and that the fictitious firms hereinbefore enumerated had no capital. (Trans., pp. 414, 415, 416.) He further testified that under the names of these fictitious concerns between 1908 and 1911, he sold various and sundry quantities of goods to the United States government. (Trans., p. 416.) It further appears from his statements that the witness Kettlewell had a working contract agreement with a Mr. Wheeler, representing the Perine Machinery Company; that the said Kettlewell was to get sixty per cent of the profit going to that concern for sales to the Navy Yard; and that he had a great many transactions with Mr. Wheeler for the Perine Machinery Company, the number of which he could not estimate. (Trans., p. 426.)

The witness testified further to having on occasion raised the bid of the Perine Machinery Company for potato peelers, and that he ordered, "at his own sweet will and without consultation with superior officers, whenever it suited his purpose."

SYSTEMATIC DECEPTION OF GOVERNMENT FOR YEARS.

That he systematically deceived the paymaster and the government officials for years and years, but in none of this systematic thievery has he connected Goldberg and Meyer, with the exception of the instances set forth in this indictment.

The testimony of Mr. Kettlewell thus summarized

states the case of the government against the defendants. Certain evidence was introduced as to a certain private account of the defendant Goldberg, but it is unnecessary to relate this here, as the direct and cross-examination of the defendant Goldberg brought out all the facts relating to the book accounts which the government claims tend to prove the guilt of the defendants.

TESTIMONY OF EMAR GOLDBERG.

DIRECT EXAMINATION.

EMAR GOLDBERG testified to having become engaged as a manager or agent of the Great Western Smelting and Refining Company at Seattle in 1903, at a salary of \$175 per month, (Trans., p. 683), but that he had never been a member of the board of directors of that concern or of any subsidiary corporation of that company. In the year 1908 he was getting a salary of approximately \$4000 a year, together with a drawing account by way of an extra allowance, which drawing account amounted to \$83.44 per month. This drawing account was to extend over a period of five years from the 1st day of April, 1908. (Trans., p. 685.) That at that time he was involved in the lumber business. Mr. Alpers, the Vice President of the Great Western Smelting and Refining Company permitted him to withdraw any amount at any time he desired not to

exceed \$5000. This drawing account was given to the witness Goldberg in lieu of commissions which he had previously received, commissions being thereafter cut off, and this bonus account being substituted in place thereof.

ACTED UNDER THE DIRECTION OF MR. ALPERS.

In the latter part of 1907 or the early part of 1908, February and March, the witness first became aware of the fact that the Atlantic fleet was coming to the Pacific Coast. (Trans., p. 690.) And in connection with the coming to the Coast of the Atlantic fleet he discussed with Mr. Alpers at the time he was here (in April, 1908), the probability of the fleet requiring zinc boilers, and also in connection therewith he discussed whether it was advisable to purchase another car of zinc from Matheson-Heggler Company. (Trans., pp. 692-693.) Mr. Alpers stated that he thought it advisable to exercise the option of another car of zinc, irrespective of whether or not the government bought the case, as the price was so low that no money could possibly be lost on it, and further instructed the witness to ask $12\frac{1}{2}c$ for this zinc (Trans., p. 696), because as long as the Great Western Smelting and Refining Company had an option on this zinc nobody would be in a position to supply this to the government, and furthermore, it did not make any difference whether they got the order or not, because the zinc would be worth the money. Mr. Alpers approved putting a bid at approximately $12\frac{1}{2}c$, but at the

same time to use discretion. About this time the witness had a discussion with Mr. Alpers about Mr. Kettlewell, the chief clerk of the paymaster's office, who was continually bothering him (the witness) for money. Mr. Alpers thereupon said that it would be best to bid in another name than that of the Great Western Smelting and Refining Company, so that Kettlewell would not further bother the Great Western people, and suggested bidding in the name of the Fowler Metal Company, which was a subsidiary of the Great Western Smelting and Refining Company. Mr. Alpers said that he would speak to Mr. Fowler about it and let the witness know. (Trans., p. 697.) The witness personally had no interest whatsoever in the Fowler Metal Company. At about this time the witness took up with Mr. Kerr, the counsel for the Great Western Smelting and Refining Company, and counsel in this case (Trans., p. 699), the question of Kettlewell's importunities for money. Mr. Kerr advised him not to make any trouble about it, and said it was best not to loan him any more money and try to get back what the witness had advanced him. Mr. Kerr also related that as long as Mr. Alpers would be up in a few days it was best to await his coming before taking any action. On the morning of April 11th, 1908, the Navy Paymaster telephoned the witness that there was a proposal for 50,000 pounds of zinc plate; so the witness went up to the navy office to get this proposal. (Trans., p. 700.) The witness was asked by Mr. Kettlewell what we intended to bid.

Thereupon, by instruction from Mr. Alpers, the witness stated about 13 cents.

KETTLEWELL BOTHERS HIM FOR MONEY.

In the month of December, 1907, Mr. Kettlewell had asked the witness to loan him \$1000, and at numerous other times, even going so far as to go to the witness's house (Trans., p. 702-3), for money. All the money the witness loaned him was before Mr. Alpers came to Seattle. (Trans., p. 701.) At the time Mr. Kettlewell asked the witness for \$1000, and upon his refusing to give it to him, Kettlewell told the witness that if he was not accommodating he would see to it that the Great Western Smelting and Refining Company did not do any more business with the Navy Yard. To which the witness in effect replied that that would not make any difference as he could not give him any money. (Trans., p. 704.)

The witness stated that Kettlewell continually reiterated that the Great Western Smelting and Refining Company were getting more business than they were entitled to, and that whereas other people were treating him right, he expected the same treatment from the Great Western people. He further stated that he loaned Kettlewell \$225, in three sums of \$75 each, which sums have never been repaid. (Trans., p. 705.) That the bonus account referred to and which the government explained as sums having been given by the witness Goldberg to Kettlewell, were sums drawn by the wit-

ness from his personal drawing account, and invested by him in personal matters, and without any reference whatsoever to any government transaction, and none of the sums drawn from this account were ever paid to the witness Kettlewell, Meyer, or any other government employee by way of commissions or profits, or for any other purpose, and were all legitimate expenditures by the witness. (Trans., pp. 707, 708.)

NO ARRANGEMENT WITH EITHER KETTLEWELL OR
MEYER AS TO SHARING IN PROFITS OF
GREAT WESTERN S. & R. CO.

The witness further testified that there were never any arrangements with Kettlewell or Meyer whereby twenty per cent of the profits of the Great Western Smelting & Refining Company from their transactions with the government were to be paid to either Kettlewell or Meyer (Trans., pp. 709, 710) ; that no authority, express or implied, had been given, nor was any such scheme ever entered into. The witness had never before heard of, or had any transaction with Lyman, Evans & Company, Smith, Hunt and Company, Peter Brandt, Peter McManus, or any other fictitious concern (Trans., p. 711), which Mr. Kettlewell employed in defrauding the government.

PRICE OF ZINC IN QUESTION NOT EXORBITANT.

The witness further testified that on numerous occasions the Great Western Smelting & Refining Com-

pany had sold to the Government zinc at 16c a pound, or at an increase of 25 per cent. over the price charged for the zinc, which it is claimed in the indictment the defendants conspired together to sell to the Government at exorbitant prices. In fact, the witness testified that whereas the Great Western Smelting & Refining Company received from the Fowler Metal Company, a subsidiary thereof, 12½c for the zinc set forth in the present indictment, on numerous occasions they had received 13c, 14c, 15c and 16c, (Trans., p. 720), and that these high prices had been authorized by the officials of the navy, and, in fact, by the acting secretary of the navy himself (Trans., p. 737). Sales at these prices were made prior and subsequent to the indictment brought in this case, and in no instance was any question raised by the government. The witness further stated that the excess of 9000 pounds had been included in the 50,000 pound requisition, as the witness and Corder had decided that the worst that could happen was that the Government would reject the 9000 pounds. Otherwise, they felt that it would be used for the battle-ship fleet which was about to come to the navy yard. (Trans., p. 722.)

The witness denied ever having called Kettlewell out in the hall, as Kettlewell testified, and having given him \$100, or as having said to him words to the effect that "this will straighten matters up, and that a big requisition would be sent through by Meyer." (Trans., p. 750.) He denied that he ever had any agreement

of any kind or character as to profit-sharing from Government transactions.

CROSS-EXAMINATION.

DIVISION OF PROCEEDS.

On cross-examination, the witness Goldberg said that there had been an award to the Great Western Smelting & Refining Company in December, 1907, for the sale of zinc to the government at 16c a pound, and that 4000 pounds were called for by the requisition, but approximately 5933 pounds were delivered. (Trans., p. 771.) The excess was afterwards bought by the government at 12½c a pound. He further stated that the expenditure of \$100 shown on the books of the Great Western Smelting & Refining Company, for which there was no accounting, was never paid to Mr. Kettlewell. (Trans., p. 773.) That in all likelihood the \$100 check referred to and payable to cash was for a Mr. Block, a man who was traveling for the company, who might have asked for the check to be made to cash. (Trans., p. 775.) He further testified to having divided the proceeds of the transaction in the indictment in controversy with the W. A. Corder Company, as per agreement with the Great Western Smelting & Refining Company, whereby the two companies were to divide the profits of these various transactions. (Trans., p. 831.)

KETTLEWELL'S IMPORTUNITIES FOR MONEY.

The witness again testified to having been continually importuned by Kettlewell to loan him money, and had numerous conversations with him in January and February of 1908, as a result of which he finally loaned him \$75 on three different occasions, making in all the sum of \$225. After having loaned him the money, Kettlewell again called the witness up, and the witness stated that that was all he could afford to loan him, and then he went to see Mr. Kerr, as previously testified. Mr. Goldberg testified to having loaned Mr. Kettlewell this money for the reason that he had been "worrying the life out of him."

TESTIMONY OF EDWIN F. MEYER.

EDWIN F. MEYER testified in substance as follows:

DIRECT EXAMINATION.

That he had been connected with various departments of the government service; that he was first connected with the store-keeper's department, and later on taken into the pay-master's department. (Trans, p. 901.) He stated that during the spring of 1908 he was in charge, as chief clerk, of the general store-keeper's office and in general charge of all duties connected with the requisitioning of supplies. (Trans., p. 908.) He stated that the system of requisitioning supplies was for the department to get information wherever possible,—

whether from the various government officials, supply merchants, or catalogues, or elsewhere,—as to the probable price which the government would have to pay for these materials, and to place in these requisitions the estimated prices. It often times happened that the estimated prices were 25 to 50 per cent higher than that which the government actually paid for the materials. There was always considerable difficulty in estimating the prices. It almost invariably happened that the goods were purchased for less than the estimated prices. (Trans., p. 946.) Often times when early deliveries were essential, as high as 14c a pound was paid for nuts, which under normal conditions, could have been purchased for 4c a pound. (Trans., p. 954.)

LARGE SUPPLY OF ZINC NECESSARY FOR FLEET.

That during the spring of 1908, February, March and April, the government determined to keep on hand a large supply of materials to build up its stock in order to be prepared to fit up the Pacific fleet which generally arrived in the spring. Among the items required for this fleet, zinc was very essential. (Trans., p. 961.) The witness then testified, (Trans., pp. 1006-1015), to instances in which the government had paid, under the authority of the secretary of the Navy Yard, or his assistant, as high as 14c or 15c a pound for zinc. That the witness received word about the middle of March that the Atlantic battle squadron would come to Seattle very shortly, and thereupon requisitions for a large

quantity of supplies were prepared. (Trans., p. 1033.) In connection therewith requisition No. 438 for 50,000 pounds of zinc was prepared. The requisitions were all for very short deliveries. (Trans., p. 1050.) At the same time this requisition No. 438 was prepared, other requisitions were prepared, calling for a larger quantity of supplies than had been customary, and no complaint has been made concerning these other requisitions. (Trans., p. 1054.) That in preparing this requisition No. 438, the motives which prompted the witness toward the same were the same which actuated him in preparing other requisitions, about which the government has made no complaint.

DENIES STATEMENTS OF KETTLEWELL.

That the statement of Kettlewell that the witness stated to the said Kettlewell that he was about to prepare a large requisition, and that he should watch for it, was absolutely false; that the witness never entered into a conspiracy with any one to defraud the United States Government in any manner whatsoever. The requisition in question was authorized by the Pay Master General of the United States Navy at 12½c (Trans., p. 1064), and that the witness had no idea to whom the contract had been let, nor had he had any conversations with Kettlewell or Goldberg concerning the same. (Trans., p. 1071.) Requisition No. 438 showed on its face, as did all other requisitions issued at the time, that it was issued for the purpose of supplying the At-

lantic Squadron which was about to arrive at the yard within a month. (Trans., p. 1092.)

The witness further testified that requisitions for zinc had come in for as high as 10,000 pounds for one ship, and that the amounts requisitioned varied from 1000 pounds to 10,000 pounds. (Trans., p. 1100.)

C

CLAIMS OF THE PLAINTIFFS IN ERROR.

There is no charge in the indictment, nor was it contended at the trial, that the materials furnished the Government were of an inferior quality; on the contrary, the proofs clearly showed that the materials were of standard quality, and that only reasonable profits were obtained, and that these same materials could not have been purchased elsewhere.

It is our contention:

I.

THE INDICTMENT IN THIS CASE IS VOID, AS IT IS BARRED BY SECTION 1044 OF THE REVISED STATUTES OF THE UNITED STATES.

This section reads:

“No person shall be prosecuted, tried or punished for any offense not capital, except as provided in section 1046, unless the indictment is found or the information is instituted within three years next after such offense shall have been committed.”

THE CONSPIRACY ENDED WITH THE DELIVERY OF THE CHECK TO THE PLAINTIFFS IN ERROR ON MAY 26, 1908, WHICH WAS MORE THAN THREE YEARS PRIOR TO THE FILING OF THE INDICTMENT.

It will certainly be conceded that if the alleged offense of conspiring to defraud the Government was completed on the 26th day of May, 1908, that the case of the prosecution is barred by the section above referred to. There is no conflict in the evidence as to the time of commission of the various acts referred to in the indictment. The testimony both of the Government and of the plaintiffs in error, agrees as to the times of occurrences. The issuing of the requisition for the purchase of the supplies in question; the giving out of information regarding the requisitions; the recommendation of the acceptance of the supplies; the giving of notice to the public that competitive bids would be received; the recommendation of the award to the plaintiffs in error; the acceptance of the supplies; the suggestion and recommendation of the payment of the check in question, and the delivery to the plaintiffs in error of this check,—all occurred long prior to the delivery of the check, which delivery was made on the 26th day of May, 1908. Prior to that date the materials had been delivered, inspected and accepted, and on that date the check was delivered, and the Public Bill for same was receipted. This receipt evidenced the completion of the transaction, and this receipt is dated May the 26th,

1908. There could have been no delivery of the check without this receipt.

THE TESTIMONY SHOWS THAT MAY 26, 1908, AND NOT JUNE 1, 1908, AS ALLEGED IN THE INDICTMENT, WAS THE DATE OF DELIVERY OF THE CHECK.

We call the Court's attention to this testimony concerning the delivery of the check:

"MR. SCHLESINGER.—I want to call your attention, Mr. Kettlewell, to what purports to be a copy of a public bill. Do you recognize that as a true copy?

"A. Yes, sir, I think that is a true copy.

"Q. I will call your attention to an endorsement upon that bill reading—

"MR. ALLEN.—Pardon me, before you read it—

"MR. SCHLESINGER.—Do you wish to see it, Mr. Allen?

"MR. ALLEN.—I would like to.

"MR. SCHLESINGER.—You have the original.

"THE COURT.—Defendants' exhibits?

"MR. SCHLESINGER.—Yes, your Honor.

(Paper referred to marked Defendants' Exhibit "G.")

"Q. Mr. Kettlewell, you knew there was a rule requiring bids to come from legitimate bidders, did you not?

"A. Yes, sir.

"Q. You knew that there was a rule requiring bids to come from persons engaged in trade, did you not?

"A. Yes, sir.

"Q. And you knew all of those matters when you were engaged in these various transactions?

"A. Yes, sir.

"Q. Now, calling your attention to this stamp (showing), will you kindly read that aloud so the jury may hear you?

"MR. ALLEN.—Is that introduced in evidence?

"MR. SCHLESINGER.—Yes, and marked Exhibit "G."

"A. 'United States Navy Pay Office, Seattle, Washington. Paid May 26, 1908. Robert H. Orr.' The rest is blurred.

"Q. And that is marked 'Paid,' is it, on May 26th, 1908? *I will ask you whether the check was delivered together with that paper on that date?*

"A. I think *that it must have been*, yes.

"Q. You think it must have been?

THE COURT.—What date was that?

"MR. SCHLESINGER.—*May 26th, 1908.* If it had not been so delivered it would not bear the imprint 'paid,' would it?

"A. No, I think not."

(Trans., pp. 428-429.)

We also call the Court's attention to this testimony regarding the proposal to sell to the government. This proposal was issued April the 11th, 1908, and award was made April 15, 1908:

"Q. This proposal is dated April 11, 1908. Would it be your recollection that was the date of the proposal as you signed it at that time, April 11, 1908?

"A. I think that was about the date.

"Q. You think that was about the date?

"A. The date that was filled in there was the date.

"Q. How long was that before the day of the

award, if the award was made on the 15th, how many days before that did you sign it?

"A. If the award was made on the 15th it would be four days.

"Q. In other words, you signed this proposal about on the 11th, as I understand you?

"A. If that is the date.

"Q. And the award was made on the 15th. Were you present at the award, as a matter of fact, do you remember?

"A. I was not."

(Trans., p. 451.)

"Q. After this conversation when did you next hear about your bid with the United States Government for a lot of zinc?

"A. I don't think I heard anything more until Mr. Goldberg called me up and told me the check was up there for it. That is my next recollection of that transaction.

"Q. Told you the check was up there for you?

"A. That is what I understood, I believe.

"Q. Did you personally get the check, or did Mr. Goldberg get it?

"A. My best recollection is that I got it.

"Q. Calling your attention to that part of Plaintiff's Exhibit No. '5,' that part which purports to be a check dated May 26th, 1908, payable to the order of the Fowler Metal Company, in the sum of \$7,417.09. Did you ever see the original of which that is a photographic copy before, Mr. Silverstone (exhibiting same to witness)?

"A. I think I did.

"Q. I will call your attention to the endorsements on the back of that check. What did you do with the check when you got it?

"A. I took it down to Mr. Goldberg, who was waiting for me at, I think, the Butler Hotel; in fact, I am sure it was the Butler Hotel; and I handed him the check.

"Q. What did he tell you then with reference to it?

"A. He asked me if I would exchange checks with him, give him my personal check for this one. I told him I would if he would endorse it, so he endorsed it over to me, 'Pay to the order of E. Silverstone,' and signed it 'Fowler Metal Company.' I then endorsed my name on it and took it to the bank to make a deposit, because I couldn't have given him my check unless I had this one in the bank. The receiving teller told me they could not accept the check that way, as the Government required some official to sign. So I took it back to Mr. Goldberg, and he endorsed it. I think it is 'Per E. S. Fowler.'" (Trans., pp. 454-455.)

"Q. When the voucher came back from the navy yard what was done then, after it was checked over?

"A. After it was checked over, a check was issued in payment therefor, and a copy of the voucher sent with the check to the dealer. A copy of the voucher was also sent with the daily reports to the Paymaster General." (Trans., pp. 292-293.)

"Q. All right; tell what happened.

"A. The requisition was received—or the approval was received on the 9th of April and the proposals were held until the 11th of April. In the meantime, as soon as the requisition was approved, I telephoned Mr. Goldberg and he came to the office and said, 'I want to get an extra set of those proposals,' he says, 'I have got another party that I want to bid on this.' He says, 'I don't propose to split up the profits with half a dozen people. I want to get another bidder on this.' I says, 'Who will it be?' He says, 'I don't know yet; I will let you know.' I says, 'Whoever it is, don't let them know I know anything about it; have them come up

here and get the proposal in the regular way.' And a gentleman did come into the office and get the proposal. He looked over the bulletin board, where we have a copy of this posted, and he says: 'I represent the Fowler Metal Company and I would like to get a set of proposals to submit a bid on this zinc,' and I says, 'All right,' and I gave him two copies. I didn't know who he was. And I also gave Mr. Goldberg an extra set of proposals." (Trans., pp. 298-299.)

"Q. Now, the first bid is to the Fowler Metal Company?

"A. The Fowler Metal Company.

"Q. And that was put in by Mr. Silverstone sitting here?

"A. Yes, sir.

"Q. The next bid?

"A. That is the same.

"Q. The next bid was to whom?

"A. The Great Western Smelting & Refining Company.

"Q. Signed by whom?

"A. Signed, Great Western Smelting & Refining Company, per Emar Goldberg.

"Q. Emar Goldberg is one of the defendants in this case?

"A. Yes, sir.

"MR. ALLEN.—What is the dates of all these now?

"MR. RIDDELL.—These are all dated what dates, Mr. Kettlewell?

"A. Dated April 11, opening April 13, 1908." (Trans., pp. 300-301.)

The testimony of Mr. J. A. Kettlewell conclusively shows the date of the delivery of this check, and is absolutely substantiated by the testimony of Mr. Emar

Goldberg, and hence all of the testimony in the case shows that the check was delivered not later than the 26th day of May, 1908.

"Q. Now, Mr. Kettlewell, I show you Plaintiff's Exhibit '5' and call your attention to the photographic copies of that first instrument there. Do you know what the instrument is of which this is a photographic copy?

"A. Copy of check issued from the navy pay office in payment for this Fowler Metal Company's zinc.

"Q. When that check was made out, then what happened?

"A. When this check was made out I phoned to Mr. Goldberg and told him that the check was ready, and the check was delivered either to Mr. Goldberg or to Mr. Silverstone, I don't remember which.

"Q. What day was it delivered?

"A. Delivered June first, no DELIVERED—DELIVERED—DELIVERED THE DAY IT WAS DATED, MAY THE 26TH.

"Q. May the 26th?

"A. THE DAY IT WAS DATED.

"Q. You don't remember to which MAN it was delivered?

"A. I couldn't say.

"MR. SCHLESINGER.—YOU MEAN MAY 26, 1908?

"A. 1908, YES SIR.

"Q. When the check was delivered?

"A. Yes, sir, THE DAY THE CHECK WAS MADE, AS I REMEMBER IT WAS DELIVERED.

"SPECIAL COUNSEL MR. RIDDELL.—

AS YOU REMEMBER, THE CHECK WAS DELIVERED THE DAY IT WAS MADE.

"A. As I remember. It may have been delivered the next day, but I THINK IT WAS THE DAY IT WAS DATED. That was the usual procedure and I know we would want to get rid of it as soon as possible." (Trans., pp. 304-307.)

Emar Goldberg, corroborating his testimony, said:

"Q. *What date was it that you received the checks from his hands?*

"A. *On the 26th day of May.*"

* * * * *

"Q. In other words, you received that check upon the 26th day of May, and that check rested in your office until the 31st day of May?

"A. Until the 1st day of June." (Trans., p. 715.)

"MR. SCHLESINGER.—What, if anything, accompanied that check?

"A. What they call a public bill.

"Q. Have you that public bill with reference to this?

"MR. ALLEN.—It is in evidence.

"MR. SCHLESINGER.—What is the number of the exhibit?

"MR. SHIPLEY.—Why, it is here, Mr. Schlesinger.

"MR. SCHLESINGER.—I will ask you whether this so-called public bill accompanied that check?

"A. Yes, sir, this public bill was with the check.

"MR. KERR.—Refer to it as an exhibit number.

"MR. SCHLESINGER.—Yes. This is Defendants' Exhibit Letter 'G.'

"Q. What did you do with this public bill at the time that it was given to you by Kettlewell together with the check?

"A. Put the bill in our files, put this in our files.

"Q. On what date?

"A. ON THE 26TH DAY OF MAY, 1908."
(Trans., p. 716.)

The receipt of the check from the officials of the Government was the last act evidencing the existence of any conspiracy. A number of overt acts were committed prior to this time, but the pleader, to avoid the obvious bar of the statute, has not declared upon a single one of these overt acts. The indictment does not set out the doing of any of the things which necessarily must have been done before the delivery of the check.

ALL ACTS SUBSEQUENT TO MAY THE 26TH, 1908, WERE PRIVATE ARRANGEMENTS BETWEEN THE PARTIES TO THE CONSPIRACY, ARRANGEMENTS BY WAY OF SETTLEMENT, AND HAVING NOTHING TO DO WITH THE SUBSTANTIVE OFFENSE.

The charging part of the indictment plainly sets out the conspiracy,—“That they should secure the issuance by the Pay Master of the United States Pay Office at Seattle, Washington, of a check payable to the order of the said Fowler Metal Company, for an amount appearing to be due the said Fowler Metal Company, according to the account so to be rendered as aforesaid, and should arrange to have said check delivered to said E. Silverstone or said Emar Goldberg.”

Then follow mere conclusions of law, and then overt acts and the overt acts all relate to the delivery of the check subsequent to May the 26th, 1908. The pleader was careful to place the time as of the first day of June, 1908, to avoid the bar of the statute.

Let us consider the position of the parties upon the day after the 26th day of May, 1908. Was there any intention to defraud present in the minds of any or all of them? They have now been paid by the United States Government in the manner which was customary for the government to pay its creditors, viz: by check on a United States depository, and it is the charge in the indictment that they conspired to obtain this very check. They had possession of a negotiable government instrument,—an instrument used by hundreds of thousands of people every day, and accepted by any one, any where, at its face value, without question. They had succeeded in selling their wares to the Government; they had succeeded in having their bid accepted; they had succeeded in securing a recommendation for the payment of their claim, and they had succeeded in securing in payment the check of the government, which was the object of the conspiracy. They had completed what they had set out to complete, according to the allegations of the indictment.

They might have kept the check one year or twenty, but the conspiracy would have still been completed. The depositing or non-depositing of the check, the division of the spoils, have nothing to do with the comple-

tion of the crime of conspiracy. It has never been argued that the success of a conspiracy is essential to indictment. This check was in form as current as if it had been bank notes or United States currency. Under the law and authorities, this government check is equivalent to currency.

They were in the possession of the equivalent of actual money. Having secured possession of the check, all of the relations and dealings between the government and the defendants with respect to the alleged crime set out, were at an end. Merely depositing the check to their credit in the bank did not add to the crime, nor take from it. The mere placing of this check to their credit had no relation to the conspiracy upon which they were indicted. It did not involve the Navy Yard in the matter, or the awarding of the contract. It merely created a new relation of debtor and creditor between the depositor and the banker. After May the 26th, 1908, the conspirators had ceased to conspire; they were then merely reaping the results of their crime.

The evidence which we have quoted upon this point distinctly shows that they were no longer conspiring, and defendants' "Exhibit G," which is the public bill stamped "Paid, May 26th, 1908," is conclusive, there then being an agreement of immediate release.

Notwithstanding the fact that the testimony of the government shows indisputably that this check was delivered May 26th, 1908, the government, to avoid the

obvious bar of the statute, charged in the indictment, as pointed out, that it was delivered "on or about the 1st day of June, 1908," just one day before the presentment and filing of the indictment.

The evidence in the case just quoted shows conclusively that this check was received as absolute payment. It was a government obligation, given for materials already received by the government. It was not given as conditional payment, but in full discharge of the debt. And this is not like an ordinary check, upon which doubt might be cast as to the financial standing of the drawer and his ability to pay. To doubt this check would be to doubt a government bond, or money of the government. It must be borne in mind that we are dealing with a government check, for government purposes, on a government depository. Does any one hesitate to accept treasury notes of the United States government, or silver certificates, or government bank notes? A government check is in the same category. The evidence absolutely shows that the check was given, received and intended as absolute payment of the claims of the plaintiffs in error.

THE STATUTE OF LIMITATIONS IN CIVIL CASES HAS BEEN HELD TO RUN FROM THE DATE OF PAYMENT BY CHECK, AND NOT FROM THE DATE ON WHICH THE CHECK IS EXCHANGED FOR ANOTHER, OR DEPOSITED OR EXCHANGED FOR OTHER MONEY.

The construction of the statute in a civil proceeding

is authority for a like construction in a criminal proceeding.

U. S. v. Kittell, 211 U. S. 370;

U. S. v. McAndrews, 149 Fed. 830.

As has been pointed out, the success or failure of the conspiracy cuts absolutely no figure. The completion of the substantive offense is absolutely immaterial. But as to that, the substantive offense was certainly completed on May the 26th, 1908, for upon this date the plaintiffs in error received the check in question. And, again, the indictment clearly charges that the purpose in view was to procure the issuance and delivery of this check.

All of the authorities agree that in civil cases the statute begins to run on the date of the receipt of the check, and not on the date it is finally cashed. In truth and in fact it does not appear that the check was ever cashed at all. The transaction did not call for cashing over the counter. It was deposited to the credit of Silverstone, one of the alleged co-conspirators, and he issued his own check in lieu thereof to G. W. S. & R. Co. See note to 15 Am. & Eng. Am. Cases, 332. to 15 Am. & Eng. Am. Cases, 332.

In *Ilsey v. Jewett*, (1840), 2 Metc. (Mass.) 168-173, the Court, speaking through Chief Justice Shaw, said:

“It has often been held in this Commonwealth, and is now considered as a settled rule of law that giving a party’s own promissory negotiable note, for a simple contract debt, is *prima facie* evidence of

payment, and may be so held, unless rebutted by clear proof that it was not so intended. *Thacher v. Dinsmore*, 5 Mass. 299; *Maneely v. McGee*, 6 Mass. 143; *Wood v. Bodwell*, 12 Pick 268."

* * * * *

"Being in legal effect, not merely an acknowledgment or promise, *but a payment*, no writing is necessary. The effect is the same as if the amount had been paid in bank notes or coin. This is an answer to the objection that the note ought not to operate as a promise in writing to pay more than it promises to pay and that to hold it to be a promise to pay the balance would be to pervert its terms, and make it speak a language that it does not speak. But the answer is that it is not considered as a promise in writing to pay the whole debt; but is of itself, *de facto a payment of part.*"

In the case of *La Fayette County Monument Corporation v. Magoon*, 3 L. R. A. 765, Judge Lyon said:

"We cannot doubt that the transactions between the parties of April 6, 1887, evidenced by the communication of the defendant to the plaintiff corporation, and the receipt which was approved and accepted by the defendant (both of which will be found in the foregoing statement of facts) show conclusively that the check in suit was given and received as a payment of the defendant's subscription to the monument fund. The language of the defendant to the plaintiff in such communication is: 'I, Henry S. Magoon . . . hereby subscribe and hand to the treasurer of said corporation \$1,000 in money to be used,' etc., and that of the receipt is: 'Received of Henry S. Magoon the sum of \$1,000, according to the foregoing letter,' etc. It is there-

fore a receipt for \$1,000 in money. We cannot conceive how the parties could have expressed in stronger terms their intention that the check was given and received as money, and hence that it paid the defendant's subscription as effectually as though the payment had actually been made in cash. Had the plaintiff brought an action upon the subscription instead of the check, we think a defense that the subscription had been paid would be proved by the transactions of April 6, 1887. Possibly this view of the case removes from it the question whether there was a valid consideration for the subscription, but it is deemed proper to determine that question."

In *Marreco v. Richardson*, 15 Am. & Eng. Ann. Cases, 329, the Court of Appeals of England, in passing upon this precise question, speaking through Lord Justice Farwell, said:

"I agree that the decision appealed from should be affirmed. The only important question in the case is the date of the part payment, for there is no written promise to pay the balance. There is no doubt the check was given in part payment of the debt, and if it was so given in due time, that is, within six years of the commencement of this action, the case is taken out of the statute; if not, the debt is statute barred.

"In *Pearce v. Davis*, (1834), 1 M. & Rob. 365, Patteson, J., says, in very terse and clear language: 'The production of this check is not evidence of any loan; if it be evidence of anything, it is rather evidence of payment. It operates as payment, until it has been presented and refused; and even if payment of it be refused, the refusal must be proved to have taken place before action brought.' In other words, if a man pays his tailor's bill by check and the check is accepted as payment, the tailor cannot

sue for his account until the check has been presented and dishonored. And if the receiver of a check does not present it for payment within a reasonable time, and the bank upon which the check is drawn fails, the loss will fall upon the holder; and the only effect that can be given to the agreement that the check should not be presented until June 20 is that if the bank had failed the loss might in that case have fallen on the drawer. But none the less the payment is made at the time when the check is given, and I infer from the judgment of Patteson, J., that the giving of a check would support a plea of payment. In the more recent case of *Hadley v. Hadley*, (1898), 2 Ch. 680, Byrne, J., held that a check for a bill of exchange given in respect of a pre-existing debt operated as a conditional payment thereof, and on the condition being performed by actual payment, the payment related back to the time when the check or bill was given. That is only expressing the same principle in another form, and I should myself prefer to say that *the giving of a check for a debt is payment conditional on the check being met, that is, subject to a condition subsequent; and if the check is met it is an actual payment ab initio and not a conditional one.* There was only one act of payment here, that *on May 10, and that was out of time* for the purpose of avoiding the operation of the statute."

* * * * *

"The only conclusion I can draw from the facts is that on June 20 the defendant fulfilled his obligation to pay the check; I cannot infer from that any promise made by him on that day to pay the remainder of his debt. Suppose that on May 10 the defendant had given a promissory note payable three months after date; payment could clearly not be en-

forced for three months. That would be a stronger case for the plaintiffs than the present one; there can be no doubt that payment of the note at the due date would be nothing more than a discharge of the obligation entered into when the note was actually made. There would not be in that case, and there is not in the present case, any fresh act or conduct from which we could infer that the debtor was promising to pay the remainder of the debt, or was doing anything more than carrying out his obligation of honoring the negotiable instrument which he had given. THE RESULT IS THAT THERE IS ONLY ONE ACT AND ONE MOMENT OF TIME WHICH CAN BE LOOKED AT HERE IN DETERMINING WHETHER THERE HAS BEEN A RENEWAL OR A PROLONGATION OF THE PERIOD WITHIN WHICH THIS ACTION COULD BE BROUGHT, AND THAT IS THE GIVING OF THE CHECK ON MAY 10; BUT THAT WAS MORE THAN SIX YEARS BEFORE THE COMMENCEMENT OF THIS ACTION, AND IT IS THEREFORE STATUTE BARRED."

(NOTE B.) "The second case is *Turney v. Dowdell*, 3 El. & Bl. 136, 77 E. C. L. 136, a very strong case in favor of the defendant. I need not cite the whole case, but the following passage from the judgment of Lord Campbell, C. J., (3 El. & Bl. 142, 77 E. C. L. 142) is very apposite: 'We think that where a bill of exchange has once been so delivered in payment on account of the debt as to raise an implication of a promise to pay the balance, the statute of limitations is answered, as from the time of such delivery, whatever afterwards takes place as to the bill.'"

In the case of *Rogers v. Durant*, 140 U. S. 301, 35 L. Ed. 482, (1891), Mr. Chief Justice Fuller said:

"Daniel comprehensively defines a check to be 'a draft or order upon a bank or banking house, purporting to be drawn upon a deposit of funds, for the payment at all events of a certain sum of money to a certain person therein named, or to him or his order, or to bearer, and payable instantly on demand.' 2 *Dan. Neg. Inst.*, Sec. 1566. And in a note to that section he gives these definitions and descriptions of checks from the text-writers: 'A check on a banker is, in legal effect, an inland bill of exchange drawn on a banker, payable to bearer on demand.' *Byles on Bills*, (Sharswood's ed.) 84. 'A check is a written order or request addressed to a bank, or to persons carrying on the business of bankers, by a party having money in their hands, requesting them to pay, on presentment, to another person, or to him or bearer, or to him or order, a certain sum of money specified in the instrument.' *Story on Prom. Notes*, Sec. 487. 'A check is a brief draft or order on a bank or banking house, directing it to pay a certain sum of money.' 2 *Pars. Notes and Bills*, 57. 'A check drawn on a bank is a bill of exchange payable on demand.' *Edwards on Bills*, 396."

* * * * *

"It has also been decided that an instrument is not less a check because it orders payment 'on account of A, (*Ridgely Nat. Bank v. Patton*, 109 Ill. 479); and that its character as a check is not changed by the fact that it is payable in another State than the one in which it is drawn. *National Bank of America v. Indiana Bkg. Co.*, 114 Ill. 483, 1 West. Rep. 354; *Union Nat. Bank v. Oceana County Bank*, 80 Ill. 212. And the settled rule in that jurisdiction is that, where a depositor draws his check on a banker who has his funds to an equal or greater amount, it operates to transfer the sum named in the check to

the payee, who can sue for and recover the amount from the banker; and that a transfer of the check carries with it the title to the sum named in the check to each successive holder. *Brown v. Leckie*, 43 Ill. 497; *Munn v. Burch*, 25 Ill. 35, and cases *supra*.

* * * * *

"The fourth plea was inaccurate in its reference to a former Statute of Limitations, approved February 10, 1849, but that is immaterial; and, stripped of surplusage, it averred that the cause of action set forth in each of the twenty special counts as well as the common counts did not accrue within five years next before the bringing of the suit."

And in the recent case of *Norton v. United States*, 205 Fed. 593, this precise question was decided by the Circuit Court of Appeals, for the Eighth Circuit, and the court said:

"It is said that the first count of indictment 587 is duplicitous in that it charges that the misapplication was by means of moneys and credits being withdrawn in the form of cash exchange in the sum and value of \$9000, by means of a check drawn by the Bartlesville State Bank upon the American National Bank in the sum of \$9000, the State Bank having no credit with the American National Bank, and giving therefor four drafts payable to the customers of Bartlesville State Bank, one for \$3000 and three for \$2000 each. It is argued that this constituted not a misapplication, but a mere matter of bookkeeping in relation to giving credits. It is true that the mere giving of a wrong credit upon the books of a bank would not of itself constitute misappropriation; but

in this case, it was not a matter of mere credit, BUT THE BANK ISSUED TO THIRD PARTIES ITS DRAFTS OR CHECKS WHICH WERE EQUIVALENT TO MONEY AND THE MISAPPROPRIATION TOOK PLACE WHEN SUCH DRAFTS WERE ISSUED IN PAYMENT OF THE \$9000 DRAFT DRAWN BY THE BARTLESVILLE STATE BANK AND NOT WHEN THE FOUR DRAFTS WERE ULTIMATELY PAID BY THE AMERICAN NATIONAL BANK. The misapplication charged in the indictment is the payment of the draft for \$9000 drawn by the Bartlesville State Bank by means of the four drafts of the American National Bank. Hence this count of the indictment is not duplicitous."

And so in the case at bar the issuance of the check to the defendants, and their receipt thereof, was the substantive offense of defrauding the government and prosecution for such offense, would have been barred on May 26, 1911, three years from the date of the delivery thereof. And surely a conspiracy cannot follow the completion of the basic offense.

The actual loss of the money to the government is not necessary to assist the indictment under section 5440 of the Revised Statutes. See *McGregor v. United States*, 134 Fed. 187.

The statute of limitations in civil cases is tolled from the date of payment by check, and not from the time it is cashed, or deposited or exchanged for another. Surely the same rule must be applied to criminal cases where the liberty of the citizen is involved.

In *Bell v. Morrison, et al.*, 26, U. S. 351, Mr. Justice Story said:

“It has often been matter of regret, in modern times that, in the construction of the statute of limitations, the decisions had not proceeded upon principles better adapted to carry into effect the real objects of the statute; that, instead of being viewed in an unfavorable light, as an unjust and discreditable defense, it had received such support, as would have made it, what it was intended to be, emphatically, a statute of repose. It is a wise and beneficial law, not designed merely to raise a presumption of payment of a just debt from lapse of time, but to afford security against stale demands, after the true state of the transaction may have been forgotten, or be incapable of explanation, by reason of the death or removal of witnesses. It has a manifest tendency to produce speedy settlements of accounts, and to suppress those prejudices which may arise up at a distance of time, and baffle every honest effort to counteract or overcome them. Parol evidence may be offered of confessions (a species of evidence which, it has been often observed, it is hard to disprove, and easy to fabricate), applicable to such remote times, as may leave no means to trace the nature, extent, or origin of the claim, and thus open the way to the most oppressive charges. If we proceed one step further, and admit that loose and general expressions from which a probable or possible inference may be deduced of the acknowledgment of a debt, by a court or jury; that, as the language of some cases has been, any acknowledgment, however slight, or any statement not amounting to a denial of the debt; at any admission of the existence of an unsettled account, without any specifications of amount or bal-

ance, and however indeterminate and casual, are yet sufficient to take the case out of the statute of limitations, and to let in evidence aliunde, to establish any debt, however large, and at whatever distance of time; it is easy to perceive, that the wholesome objects of the statute, must be, in a great measure, defective; and the statute virtually repealed."

In the case of *Palmer v. Priest*, 18 Fed. Cas. 1014, Judge Sprague, speaking for the court, said:

"Where, then, it appears to the court, that the note of a sole debtor, or of one of several debtors, or of a third person, was by mutual agreement taken in discharge or payment of a pre-existing debt, the original claim is thereby extinguished, and the creditor can rely only on the note.

"The receipt, in this case, is evidence that such was the agreement between these parties. It is not necessarily conclusive. It may be controlled, either by direct evidence or by circumstances. But here there is neither direct evidence, nor any circumstance in any degree impairing the force of the receipt, and the libelants have therein declared that the note was received in payment. This is more direct and positive than in *The Chusan* (Case No. 2,717, where the receipt was of a note 'for the above amount,' or in *Butts v. Dean*, 2 Metc. (Mass.) 77, where the receipt was, 'for balance of account to date.' Libel dismissed."

In *Commonwealth v. Wood*, 8 N. E. 432, Chief Justice Morton said:

"The defendant asked the court to rule that, upon the evidence, 'the offense was not complete in this commonwealth, and, even if complete, defendant

could not be convicted in this county,' which ruling the court refused. It appears by the bill of exceptions that 'the government introduced evidence tending to prove the representations alleged at Berlin; that they were false and known to be so by the defendant; and also that the purpose of the defendant in making them was as alleged in the indictment; and that, in consequence thereof, Peters was induced to send a cashier's draft for the amount named, of which a copy is inserted in the indictment, to the defendant, at New York, being directed so to do by a note written by defendant, and left at Peters' place of business in Boston.' Although the defendant received the money on the cashier's draft in New York or in Minneapolis, *it cannot be doubted that the offense charged in the indictment was accomplished and completed at Berlin when Peters, at the request of the defendant, sent him the draft, whether he sent it by the hand of an agent of the defendant, or deposited it in the mail.* The exceptions do not show how he sent it; but, if he sent it by a carrier or other agent of the defendant, the delivery to the agent was a delivery to the defendant. *Com. v. Taylor*, 105 Mass. 172. So, if he sent it by mail, when he deposited it in the post-office it passed out of his control into the control of the defendant, and the postmaster was the agent of the defendant to forward the letter to him. *Regina v. Jones*, 1 Eng. Law. & Eq. 533; S. C. 4 Cox, Crim. Cas. 198."

In *State v. Briggs*, 7 L. R. A. (N. S.) 278, Chief Justice Johnston, of the Supreme Court of Kansas, speaking for the court, said:

"It is said that the draft was obtained in Crawford County, where the prosecution was had, while the money was obtained upon it in Labette

County. Only one offense was charged, and it arose out of the single transaction of obtaining the draft for \$60 by false pretenses. The averment that he had collected the money on the draft did not state an additional offense, nor invalidate the information. *State v. Pryor*, 53 Kan. 657, 37 Pac. 169; *State v. McDonald*, 59 Kan. 241, 52 Pac. 453; *State v. Meade*, 56 Kan. 690, 44 Pac. 619. Nor can there be a valid objection to the jurisdiction of the court. The false representations and pretenses were made in Crawford County, and the draft was mailed by Mattox to Briggs in the same county. It was received in Labette County, it is true; but the general rule is that the venue is in the county where the property is obtained by the false pretense. The draft was obtained by the false pretense. The draft was obtained from Mattox when he surrendered possession of it by placing it in the post-office, addressed to the appellant. The Postoffice Department is deemed to be the agent of the appellant in the same way that a common carrier would have been his agent if the draft had been given to it for delivery to the appellant. *Re Stephenson*, 67 Kan. 556, 73 Pac. 62; *Com. v. Wood*, 142 Mass, 459, 462, 8 N. E. 432; *Reg. v. Jones*, 1 Den. C. C. 551; *Reg. v. Leech*, Dears. C. C. 642; 1 McClain, Crim. Law, sec. 696."

In the case of *Ball v. Shepard*, 95 N. E. Rep. 719, New York Court of Appeals, decided in 1911, it was said:

"The law, wisely, from considerations of public policy and convenience, and to give security and certainty to business transactions, adjudges that the possession of money vests the title in the holder as to third persons dealing with him and receiving it

in due course of business and in good faith upon a valid consideration.' 79 N. Y. 187 (35 Am. Rep. 511). Perhaps the simplest illustration of this principle is to be found in *Justh v. Nat. Bank of Commonwealth, supra*, where the plaintiffs' certified checks which had been obtained by fraud, were deposited with the defendant bank by the person committing the fraud, in the ordinary course of business, and were paid by the bank on presentation. In that case the court suggested that the plaintiffs were cheated, not by the defendant, but by the fraud of the parties to whom they gave their certified checks, and that the loss occasioned by that fraud could not be transferred to the defendant bank, which was an entirely innocent party. The checks there used were referred to by the court as money which came into the hands of the defendant 'in the regular course of business, in a form as current as if it had been bank notes or United States currency,' and the court concluded that, if in such a case, it could be followed because the party who paid it procured it fraudulently, 'the transaction of business must stop, for no inquiry and no precaution could guard the receiver from responsibility.'

AFTER MAY 26, 1908, THE CONSPIRACY CEASED TO BE
A CONTINUING OFFENSE, AND BECAME A COMPLETED
CONSPIRACY WITH A CONTINUING RESULT.

THE OBJECT OF THE CONSPIRACY, THE RECEIPT OF THE
CHECK, WAS EFFECTED ON MAY 26, 1908.

In *Lonabaugh v. United States*, 179 Fed. 476, the defendants were convicted of a conspiracy to defraud the United States of the possession and title of certain of its public lands by means of fraudulent entries under the

Public Land Laws of the United States. The conspiracy consisted of the filing of false entries, after which patents were executed and recorded in the office of the General Land Office of Washington. Thereafter the conspirators obtained to themselves an actual physical delivery of these patents, and caused them to be recorded at the county clerk's office where the land was situated, and the Court of Appeals, speaking through Mr. Justice Van Devanter, then Circuit Judge sitting on the Circuit Court of Appeals for the Eighth Circuit, said:

"Briefly stated the case made by the evidence, when interpreted most favorably for the government, was as follows: The defendants entered into the conspiracy on or before June 13, 1903. The fraud was to be effected by means of entries which were to be apparently regular, but actually fraudulent, in that they were to be secured by submitting to the local land office proofs falsely stating that the entrymen severally were making the entries solely for their own use and benefit, when in truth they were making them for the use and benefit of a corporation, and were obligated to convey the lands to it when the entries were secured; and the purpose in so falsifying the proofs was to induce the officers of the Land Department to allow the entries and to pass them to patent, neither of which lawfully could be done of the proofs disclosed the true facts. The entries actually were secured by the submission of false proofs as was contemplated; the entrymen, with a single exception, then executed and delivered to the corporation warranty deeds for the lands entered by them, and the remaining entryman then likewise conveyed the lands entered by him to an in-

dividual grantee designated by the defendants. Later the officers of the Land Department at Washington, acting upon the false proofs submitted when the entries were secured, issued to the entrymen patents for the lands (by which it is meant that the patents were duly signed, sealed, countersigned, and recorded in the office of the recorder of the General Land Office at Washington), and STILL LATER THE DEFENDANTS, OR SOME of them, sought and OBTAINED A PHYSICAL DELIVERY OF THE PATENTS, AND THEN CAUSED THEM AND THE DEEDS TO THE CORPORATION TO BE RECORDED IN THE COUNTY CLERK'S OFFICE IN THE COUNTY WHERE THE LANDS ARE SITUATE. And after the issuance of the patents the defendants or some of them also caused the title to the land which had been conveyed to an individual grantee, as before stated, to be passed to the corporation. But the dates of the several acts here recited were such that no overt act occurred within three years of the finding of the indictment, unless the issuance of the patents by the officers of the Land Department at Washington or some of the acts SUBSEQUENTLY DONE BY ONE OR MORE OF THE DEFENDANTS CAN BE REGARDED AS SUCH AN ACT."

* * * * *

"While the gravamen of the offense is the conspiracy, the terms of section 5440 are such that there also must be an overt act to make the offense complete (*Hyde v. Shine*, 199 U. S., 62, 76, 25 Sup. Ct. 760, 50 L. ed. 90); and so the period of limitation must be computed from the date of the overt act rather than the formation of the conspiracy. And where during the existence of the conspiracy there

are successive overt acts, the period of limitation must be computed from the date of the last of them of which there is appropriate allegation and proof, and this although some of the earlier acts may have occurred more than three years before the indictment was found. *Lorenz v. United States*, 24 App. D. C. 337, 387; s. c. 196 U. S. 640, 25 Sup. Ct. 796, 49 L. Ed. 631; *Ware v. United States*, 84 C. C. A. 503, 154 Fed. 577, 12 L. R. A. (N. S.) 1053; s. c. 207 U. S. 588, 28 Sup. Ct. 255, 52 L. Ed. 353; *Jones v. United States*, 89 C. C. A. 303, 162 Fed. 417; s. c. 212 U. S. 576, 29 Sup. Ct. 685, 53 L. Ed. 657."

* * * * *

"The subsequent acts are not open to the same objection, for they were the acts of one or more of the conspirators. But were they done to effect the object of the conspiracy, that is, to defraud the United States of the possession and title? This depends upon whether or not that object had been effected before those acts were done. If it had, the answer must be in the negative, because of the obvious inconsistency in treating an object already effected as still requiring something to be done to effect it. As to the possession, it is enough to say that it passed from the United States when the entries were secured and passed unqualifiedly with the title. When, then, did the title pass from the United States? To this there can be but one answer, which is that given in *United States v. Schurz*, 102 U. S. 378, 26 L. Ed. 167. In that case the Secretary of the Interior, upon becoming satisfied that the grantee named in an undelivered patent was not entitled to the land purporting to be conveyed thereby, canceled the patent, but it was held that the title had

passed to the grantee, and was not recalled by what was done, the court saying:

“The Constitution of the United States declares that Congress shall have power to dispose of and make all needful rules and regulations respecting the territory and other property belonging to the United States. Under this provision the sale of the public lands was placed by statute under the control of the Secretary of the Interior. To aid him in the performance of this duty, a bureau was created, at the head of which is the Commissioner of the General Land office, with many subordinates. To them, as a special tribunal, Congress confided the execution of the laws which regulate the surveying, the selling and the general care of these lands.

“Congress has also enacted a system of laws by which rights to these lands may be acquired, and the title of the government conveyed to the citizen. . . .

“In the case before us it is said that the instrument called a patent, which purports in the name of the United States to convey to McBride the lands in controversy, is not effectual for that purpose for want of delivery. That though signed, sealed, countersigned and recorded, and then sent to the register of the land office at Salt Lake City for delivery to him, it never was so delivered, and has always remained under the control of the officers of the Land Department, and that the instrument is invalid as a deed of conveyance for want of delivery to the grantee.

* * * * *

“We are of opinion that when, upon the decision of the proper office that the citizen has become entitled to a patent for a portion of the public lands, such a patent made out in that office is signed by the President, sealed with the seal of the General Land Office, countersigned by the recorder of the land office, and duly recorded in the record book kept for that purpose, it becomes a solemn public act of the government of the United States, and needs no further delivery or other authentication to make it perfect and valid. In such case the title to the land conveyed passes by matter of record to the grantee, and the delivery which is required when a deed is made by a private individual is not necessary to give effect to the granting clause of the instrument. * * *

“The mode of avoiding it, if voidable, is not by arbitrarily withholding it, but by judicial proceedings to set it aside, or correct it if only partially wrong. It was within the province of those officers to sell the land, and to decide to whom and for what price it should be sold; and when, in accordance with their decision, it was sold, the money paid for it, and the grant carried into effect by a duly executed patent, that instrument carried with it the title of the United States to the land.

“From the very nature of the functions performed by these officers, and from the fact that a transfer of the title from the United States to another owner follows their favorable action, it must result that at some stage or other of the proceedings their authority in the matter ceases.

“It is equally clear that this period is, at the latest, precisely when the last act in the series essential to the transfer of title has been performed. Whenever this takes place, the land has ceased to be the land of the government; or, to speak in technical language, the legal title has passed from the government and the power of these officers to deal with it has also passed away. The fact that the evidence of this transfer of title remains in the possession of the land officers cannot restore the title to the United States or defeat that of the grantee, any more than the burning up of a man's title deeds destroys his title. * * *

“The acts of Congress provide for the record of all patents for land in an office, and in books, kept for that purpose. An officer, called the “recorder,” is appointed to make and to keep these records. He is required to record every patent before it is issued, and to countersign the instrument to be delivered to the grantee. This, then, is the final record of the transaction,—the legally prescribed act which completes what Blackstone called “title by record”; and, when this is done, the grantee is invested with that title.”

“Other decisions to the same effect are *Bicknell v. Comstock*, 113 U. S. 149, 151, 5 Sup. Ct. 399, 28 L. Ed. 962; *Noble v. Union River Logging Co.*, 147 U. S. 165, 176, 13 Sup. Ct. 271, 37 L. Ed. 123; *McCormick v. Aultman*, 169 U. S. 606, 608, 18 Sup. Ct. 443, 42 L. Ed. 875.

“And there is no distinction in this respect between patents which are issued upon *bona fide* entries and those which are issued upon fraudulent entries is illustrated in *Colorado Coal Co. v. United States*, 123 U. S. 307, 313, 8 Sup. Ct. 131, 31 L. Ed. 182, where it was said:

“‘It is fully established by the evidence that there were in fact no actual settlements and improvements on any of the lands as falsely set out in the affidavits in support of the pre-emption claims and in the certificates issued thereon. This undoubtedly constituted a fraud upon the United States sufficient in equity as against the parties perpetrating it, or those claiming under them with notice of it, to justify the cancellation of the patents issued to them. But it was not such a fraud as prevents the passing of the legal title by the patents.’

“Applying these decisions to the present case, it is plain that the title passed from the United States when the patents were executed and were recorded in the office of the recorder of the General Land Office at Washington, and that neither a physical delivery of them nor any further act was essential to make them perfect or effective. And, recalling what has been said about the possession and the right of possession, we think it also is plain that the object of the conspiracy was effected when the title passed from the United States, and, therefore, that what was done thereafter was not done to effect that object.

“But it is contended that the conspiracy was not limited to the defrauding of the United States of the lands, but included the transfer of them to the corporation, and that until both of these things were done the object of the conspiracy was not effected. *Passing the question of whether or not the indictment charges the object of the conspiracy so broadly, and treating the evidence as sufficient in that regard, we come at once to test the contention in the light of the statute.* Section 5440 does not interdict all con-

spiracies, but only those whose object is 'either to commit any offense against the United States or to defraud the United States in any manner or for any purpose,' and then only when one or more of the conspirators do some 'act *to effect the object* of the conspiracy.' It is not enough that the conspiracy be directed to the attainment of *some unlawful object*, or to the attainment of some lawful object by unlawful means; it must be directed to the attainment of one of the objects specified. *Nor is it enough that the overt act be directed to the attainment of some other object; it must be directed to the attainment of the object which brings the conspiracy within the interdiction;* and when that object is attained 'the object of the conspiracy,' in the sense of the statute, is effected. In this view of the statute the contention must fail. The conspiracy came within the interdiction because it had for one of its objects the defrauding of the United States of certain of its public lands, and that object was effected when, as a result of the deceit practiced upon the officers of the land department, the lands were patented to entrymen who were not entitled to them considering the antecedent agreement or obligation in pursuance of which the entries were secured. See *United States v. Keitel*, 211 U. S. 370, 391, 29 Sup. Ct. 123, 53 L. Ed. 230.

"It follows from what we have said that the case made by the evidence was one that was barred by the statute of limitation and that the request for a directed verdict of acquittal should have been granted."

The Lonabaugh case has been followed by the United States Supreme Court in both the Hyde and *Elliott v. Brown* cases. And is there any distinction between the case at bar and the Lonabaugh case? According to the allegations of the indictment, the plaintiffs in error

sought to defraud the government of money. In the Lonabaugh case, the defendants sought to defraud the government of property.

In *Brown v. Elliott*, 225 U. S. 1140, Mr. Justice McKenna, in considering the Lonabaugh case, said:

"In *Lonabaugh v. United States*, 103 C. C. A. 56, 179 Fed. 476, the circuit court of appeals of the eighth circuit considered the relation of the overt acts to the conspiracy and their effect in determining the application of the statute of limitations. The court said, by Mr. Justice Van Devanter, then circuit judge: 'While the gravamen of the offense is the conspiracy, the terms of sec. 5440 (U. S. Comp. Stat. 1901, p. 3676), are such that there also must be an overt act to make the offense complete. (*Hyde v. Shine*, 199 U. S. 62, 76, 50 L. Ed. 90, 94, 25 Sup. Ct. Rep. 760) ; and so the period of limitation must be computed from the date of the overt act rather than the formation of the conspiracy. And where, during the existence of the conspiracy, there are successive overt acts, the period of limitation must be computed from the date of the last of them of which there is an appropriate allegation and proof, and this although some of the earlier acts may have occurred more than three years before the indictment was found. *Lorenz v. United States*, 24 App. D. C. 337, 387, s. c. 196 U. S. 640, 49 L. Ed. 631, 25 Sup. Ct. Rep. 796; *Ware v. United States*, 12 L. R. A. (N. S.) 1053, 84 C. C. A. 503; 154 Fed. 577, 12 Ann. Cas. 233, s. c. 207 U. S. 588, 52 L. ed. 353, 28 Sup. Ct. Rep. 255; *Jones v. United States*, 89 C. C. A. 303, 162 Fed. 417; s. c. 212 U. S. 576, 53 L. ed. 657, 29 Sup. Ct. Rep. 685.'"

It was expressly held in the Lonabaugh case that the

procurement of the physical delivery of the patents, and causing them and the deeds to the corporation to be recorded in the county clerk's office in the county where the lands were situated, was not an overt act. In the light of this decision, how can it be held that any acts beyond the mere delivery of the check can be considered as overt acts? The procurement of another check, or merely exchanging the check for money, or another check or a mere depositing of the check as here was a mere result, and not a part and parcel of the conspiracy upon which the plaintiffs in error were indicted. And this decision distinctly holds that some of the acts "subsequently done by one or more of the defendants cannot be regarded as overt acts."

Let us assume that part of this money is today in existence. Would the mere passing of a part of it from one defendant to another be regarded as an overt act? Let us suppose that \$7000 in gold coin were paid out for this government obligation, to obtain which the conspiracy was formed. And let us suppose that the same had been placed in a safety deposit box and was doled out from time to time by one co-conspirator to another, this process consuming a number of years. Could it be argued that whenever any part of it was paid out, that that constituted an overt act under the indictment?

THE DISTINCTION BETWEEN A "CONTINUING OFFENSE" AND A "COMPLETED OFFENSE WITH A CONTINUING RESULT" IS WELL ILLUSTRATED BY THE CASES HEREIN CITED AND QUOTED FROM.

This alleged conspiracy is not a continuous crime. It was not to acquire lands without regard to location or time; it was a single conspiracy, having for its object a single purpose. It related to a single transaction,—the sale of a specific quantity of goods, to the government, for a specified price. We have here a conspiracy confined to a single undertaking or purpose, not a continuous conspiracy, such as was declared in *Hyde v. United States*, but a conspiracy having for its object and purpose the acquirement of the check in question. And even if it were a continuing conspiracy, the last overt act was the delivery of the check. This precise question came before the United States Supreme Court in the case of *United States v. Irvine*, 98 U. S. 451, and this case clearly answers the contention of the government that the subsequent acts of one of the defendants with respect to the depositing to the credit of some one of the check and the division of the proceeds may be construed as an overt act.

In this case the defendant Clark Irvine was charged in the indictment with having on the 24th day of December, 1870, as the agent and attorney of Mrs. Berkely, wrongfully withholding from her the amount of her pension, to-wit: the sum of Five Hundred Twenty-five (\$525.00) Dollars, and continually withholding it until

the time of the finding of the indictment in September, 1875. Mr. Justice Miller said:

"The defendant pleaded the statute of limitations of two years as a bar to the indictment, and the court, having refused him the benefit of the bar on trial, now certify other questions on that subject, namely: 2. Is the crime a continuous one down to the time of finding the indictment? 3. Does the Statute of Limitations constitute a bar to this prosecution, the indictment having been found September 15, 1875? * * *

"There is in this but one offence. When it is committed, the party is guilty and is subject to criminal prosecution, and from that time, also, the Statute of Limitations applicable to the offence begins to run.

"It is unreasonable to hold that twenty years after this he can be indicted for wrongfully withholding the money, and be put to prove his innocence after his receipt is lost, and when perhaps the pensioner is dead; but the fact of his receipt of the money is matter of record in the pension office.

"He pleads the statute of two years, a statute which was made for such a case as this; but the reply is, You received the money. You have continued to withhold it these twenty years; every year, every month, every day, was a withholding, within the meaning of the statute.

"We do not so construe the act. Whenever the act or series of acts necessary to constitute a criminal withholding of the money have transpired, the crime is complete, and from that day the Statute of Limitations begins to run against the prosecution.

"In the case before us, the judges certify that it appeared on the trial that the pensioner demanded her money of defendant on the 24th of December, 1870, and he refused to pay her, and had never paid

her up to the finding of the indictment, Sept. 15, 1875; that he requested the judge to instruct the jury to acquit him, because the offense was barred by the Statute of Limitations, which the court refused to do.

"We think the statute (Rev. Stat. sect. 1044) was a bar; and we say in answer to the second question, that the crime, as shown in this case, was not a continuous one to the time of the indictment; and to the third, that the Statute of Limitations constitutes a bar to this prosecution."

And so in the case at bar, as soon as the bid for these materials was accepted and the award made and the certified public bill issued, and the check issued, the object of the conspiracy, which was to defraud the United States Government, out of exorbitant prices for materials furnished, was consummated and the agreement was completed under section 5440 of the Revised Statutes, and from that time the Statute of Limitations began to run. The mere changing of the check into another form of Government obligation or currency or gold coin, in order to more conveniently divide the spoils, had no relation to the conspiracy, or the charge of the Government against the defendants. These acts were mere results of a conspiracy to defraud—a successful conspiracy, if you will; for surely this conspiracy has succeeded the very moment the Government made its award, and surely when the Government issued its check, or Government obligation.

The Government was defrauded on the 26th day of May, when the check was delivered, and it passed out

of the hands of Government officials into the hands of the defendants.

In the case of *Ex Parte Black*, 147 Fed. 841, the prisoner was charged with a conspiracy to defraud the United States out of its title to certain of its public lands, which were subject to entry under the Stone and Timber Act. The indictment charged "that from the 1st day of September, 1902, and thence down to and inclusive of the 20th day of June, 1903, the defendants did, knowingly and unlawfully, plot, combine, confederate and agree together with each other and between and amongst themselves, to defraud the United States of America of the possession and use of large tracts of public lands, which were then owned by the Government, in the district of the State of Oregon, and said conspiracy was to be carried out by promising and agreeing to pay large sums of money to sundry and divers persons, who were thereby induced, caused, procured and persuaded to make false, fictitious and illegal entries upon the aforesaid lands of the United States. District Judge Quarles said at page 839:

"This indictment has industriously obscured the distinction between section 5440 and the common law. It has ignored all the overt acts incident to the fraudulent entry of these lands, and has seized upon an act which relates back to the conspiracy as and for the only overt act. The payment of the several entrymen must be distinguished from an open act in furtherance of the common purpose, because it is connected therewith only through the initial agree-

ment; otherwise it has no relevance to the alleged crime. The stone and timber act under which these entries were made, itself prescribes the several steps which must be taken to effect the object of this conspiracy. FOR SOME REASON WHICH MAY APPEAR LATER ON, ALL THESE HAVE BEEN IGNORED BY THE PLEADER, AND AN INGENIOUS EFFORT HAS BEEN MADE TO SUBSTITUTE AN EQUIVOCAL ACT WHICH BELONGS TO THE FORMATIVE STAGE OF THE CONSPIRACY. TO GIVE EFFECT TO THE STATUTE, AND TO ENFORCE THE WISE AND GRACIOUS POLICY OF CONGRESS, WHICH RECOGNIZES AN INTERVAL KNOWN AS THE LOCUS PENITENTIAE, BETWEEN THE CONSPIRACY AND THE OVERT ACT, WE ARE CONSTRAINED TO HOLD THAT THE INDICTMENT IS IN THIS REGARD RADICALLY DEFECTIVE.

"Second. The undisputed evidence shows that before the 3d day of April, 1903, the date of the earliest alleged overt act, the conspiracy laid in the indictment had been consummated. There is a strange confusion in the averments of the indictment as to dates and the sequence of events, whereby, upon the face of the indictment, it would appear that by the payment of \$200 to John B. Million, one of the entrymen, on the 4th day of April, 1903, he was induced and persuaded to make certain false and fraudulent entries which were 'then and there made', etc. The witnesses for the government, and the track book of the Land Office, show beyond dispute that each and every of these preliminary entries was made on the 7th and 8th of October, 1902. So that these entrymen must have been 'persuaded and induced' to undertake this scheme before that date. In like manner it is conceded by the government that the final proofs were

made as to each and every of these tracts of land, the consideration thereof paid to the government, final certificates issued, and a conveyance taken from each of the entrymen, on or before the 17th day of March, 1903. THEREBY EVERYTHING WAS ACCOMPLISHED WHICH WAS CONTEMPLATED BY THE CONSPIRACY, AS LAID IN THE INDICTMENT. EVERY STEP HAD BEEN TAKEN AND HAD BEEN RATIFIED AND APPROVED BY THE OFFICERS OF THE LAND OFFICE, AND A TRANSFER SECURED OF THE FRAUDULENT TITLES SO ACQUIRED. THE ONLY OVERT ACTS TO SUPPORT THE INDICTMENT ARE CERTAIN PAYMENTS MADE TO THE ENTRYMEN BETWEEN THE 4TH DAY OF APRIL AND THE 13TH DAY OF JUNE, 1903, TO CARRY OUT THE AGREEMENT MADE IN THE PRECEDING SEPTEMBER WHEN THEY JOINED THE CONSPIRACY.

“An overt act presupposes a pending conspiracy. So that the act of any one done in furtherance of the conspiracy, may bind all of his associates. When a conspiracy has been completely effected, this implied agency disappears. *Logan v. United States*, 144 U. S. 263, 12 Sup. Ct. 617, 36 L. Ed. 429; *Brown v. United States*, 150 U. S. 93, 14 Sup. Ct. 37, 36 L. Ed. 1010. It is a contradiction of terms to speak of an act done to effect the purpose of the conspiracy after the conspiracy has been accomplished. SUCH AN ANOMALOUS DOCTRINE MIGHT PROLONG A CONSPIRACY, AND WOULD KEEP IT IN ACTIVE OPERATION UNTIL EVERY OBLIGATION INCURRED DURING THE FORMATIVE PERIOD OF THE PLOT HAD

BEEN LIQUIDATED. In *United States v. Donau*, 11 Blatchf. 168, Fed. Cas. No. 14,983, the function of an overt act is declared to be 'to show that the unlawful combination became a living, active combination'. I believe no case can be found where the overt act post-dated the consummation of the conspiracy. Where would be the *locus penitentiae* in such a case? So that, whether you consider the subject-matter of the alleged overt act or its date, weeks after the conspiracy had been completed, the indictment discloses a desperate effort on the part of the pleader to confuse the distinction of the law, and to resuscitate a cause of action which, presumably, through the neglect of some one, has been allowed to lapse.

"Third. It is apparent from the evidence that the cause of action set out in the indictment is barred by the statute of limitations. By section 1044, Rev. St. (U. S. Comp. St. 1901, p. 725), Congress has declared:

" 'No person shall be prosecuted, tried or punished for any offense . . . unless the indictment is found . . . within three years next after such offense shall have been committed.'

"Judge Bunn, in *United States v. McCord* (D. C.), 72 Fed. 159, says:

" 'I have no doubt that the statute of limitations has stood in the way of this prosecution from the first, and that counsel for the government have felt the difficulty.'

"This language seems to fit the case at bar, and to explain some eccentricities of the pleader. When was this offense committed, and when did the three years begin to run? The indictment avers that the conspiracy was formed in September, 1902, to bring about the fraudulent entry of certain lands therein described. The filing of the necessary affidavits on the 7th and 8th of October, 1902, must have set the

statute running, because it was an open act on the part of the defendants to effect the purpose of the conspiracy. Therefore, according to the general precepts of the law, the action would be barred on the 8th day of October, 1905. The indictment in this case was found on the 3d of April, 1906. TO ESCAPE THIS DILEMMA THE PLEADER HAS BEEN DRIVEN TO SKILLFUL FENCING AND ADROIT EXPEDIENTS.

"It is contended on the part of the government that this was a so-called continuing crime. Conceding for the purposes of this argument that a conspiracy may, under certain circumstances, be recognized as a continuing crime; what fact or feature is there here to bring this case within such a classification? Here the CONSPIRACY WAS CONFINED TO A SINGLE UNDERTAKING, limited to particular descriptions of land, and completed within six months. The entrymen were handled like a drilled squad, and transported from place to place, taking the several necessary steps which culminated, on the 17th day of March, 1903. No effort was made to enlarge the original conspiracy to embrace any other lands, *or adapt it to any further or different transaction*. In the *Greene-Gaynor Case*, *United States v. Greene* (D. C.), 115 Fed. 349; *Greene v. Henkel*, 183 U. S. 251, 22 Sup. Ct. 218, 46 L. Ed. 177, the conspiracy was formed in 1891. From year to year the old conspiracy was adapted to new contracts, whereby the government was defrauded; and in 1897 it was revived as to certain new government contracts. There might be some reason for treating that as a continuing offense, which was revived afresh with each new contract. But there is no well-reasoned case to which my attention has been called which justifies the doctrine that in every case of conspiracy the statute begins to run from the last overt act instead of the first.

In cases of that nature the doctrine of *Commonwealth v. Bartilson*, 85 Pa. 482, and *Insurance Company v. State*, 75 Miss. 24, 22 South. 99, is the more sane and reasonable. If the illicit scheme is continued and new overt acts to carry it out occur within the period of limitation, the pleader should charge a new conspiracy, and the jury may be warranted from all the evidence in finding the existence of such new offense within that period. This appears to have been the course adopted in *United States v. Greene*, (D. C.) 115 Fed. 349. The indictment charged a conspiracy in 1891 and another in 1897, notwithstanding what is said in the opening about a continuing crime. Certain it is that on the 8th day of October, 1902, a definite overt act was performed, and on the 9th day of October, 1902, an indictment, charging the conspiracy might have been found. Certainly the statute began to run at that date. What circumstance has intervened in this case to interrupt it?"

This case was reviewed in *United States v. Kissell*, 218 U. S. 601, in which the Court said:

"The argument so far as the premises are true does not suffice to prove that a conspiracy, although it exists, as soon as the agreement is made, may not continue beyond the moment of making it. It is true that the unlawful agreement satisfies the definition of the crime, but it does not exhaust it. It also is true, of course, that THE MERE CONTINUANCE OF THE RESULT OF A CRIME DOES NOT CONSTITUTE THE CRIME.

* * * * *

(1179) "Now, of course, it well may be that the object was so far accomplished by this vote that the

conspiracy was at an end; but a vote upon pledged stock that might be redeemed was not necessarily lasting, and further action might be necessary to reach the desired result.

* * * * *

(1179) "Apart from technical rules the averments of time in the indictment are expected and intended to be proved as laid. The overt acts relied upon, coming down to within three years of the indictment are alleged to have been done in pursuance of the conspiracy, and the pleas must be taken to deny that allegation unless they rely upon the supposed impossibility of the acts having the character alleged. It is only by an artificial rule, if at all, that the plea can be treated as not traversing the indictment, and we are not prepared to give that supposed rule such an effect.

"The discussion at the bar took a wider range and is open at this stage. It hardly is necessary to explain that we have nothing to say as to what evidence would be sufficient to prove the continuation of the conspiracy, or where the burden of pleading or proof as to abandonment would be. We deal only with the naked and highly technical question when once the possibility of continuation is established, and as to that we can not bring ourselves to doubt."

In the case of *United States v. Phillips*, 196 Fed. 574, (1912) where a bankrupt was indicted for concealing property from his trustee, the District Court for the Southern District of New York, speaking through Judge Hough, said:

"But even the *Kissel Case*, 218 U. S., at page 607, 31 Sup. Ct. at page 126 (54 L. Ed. 1168), does not

impugn the authority of the *Irvine case*, and admits THAT THE MERE CONTINUANCE OF THE RESULT OF A CRIME DOES NOT CONTINUE THE CRIME. In my judgment there is legal identity between the *Irvine case* and the one at bar; in both there was what amounted to a demand, and the demand was that the withholding or secreting of property should cease and the person lawfully entitled thereto should receive possession thereof. To apply, or seek to apply, the doctrine of the *Kissell case* to this indictment, results in this: The government, by proving that a bankrupt many years ago secreted some articles of property from his trustee, which fact the trustee knew or had good cause to believe, and for which property demand has duly been made, thereby raises the presumption (apparently irrebuttable) that the crime had continued and would continue as long as the criminal lived and did not surrender. This is the situation painted with disapproval in the *Irvine case*, 98 U. S., at page 452 (25 L. Ed. 193), and to look upon the facts otherwise is to overrule and disregard statutes of limitation generally. If Phillips can be successfully prosecuted under this indictment, every living bankrupt who has been suspected of concealing property can at any time be indicted therefor. I do not so read the act."

THE RETENTION OF THE CHECK FROM MAY 26 TO JUNE 2, 1908, COULD NOT AND DID NOT CONTINUE THE CRIME.

Could it be argument in this case that the mere keeping of the check continued the crime? Or the mere exchanging of the check or depositing the check. In exchanging of the check or depositing the check continuation was the mere result of the crime? In fact it is

not apparent that any coin was ever obtained. In *United States v. Black*, 160 Fed. 431, the Circuit Court of Appeals said:

“Whatever may appear from the indictment as the relations of these payments and of the payees to the alleged conspiracy, the proof of the fact and date of completion of entries and issuance of certificates of purchase establishes beyond controversy that each payment was made not as an ‘act to effect the object of the conspiracy’, nor to procure services to that end, but in SETTLEMENT OR PAYMENT FOR A PRE-EXISTING SERVICE OR OBLIGATION; that such service was necessarily completed and the obligation INCURRED PRIOR TO THE DATE OF THE LAST CERTIFICATE OF PURCHASE MARCH 17, 1903; so that neither fact nor date of the payment so made can serve as an overt act for charging conspiracy under Section 5440, and thus evade the above mentioned limitation. Assuming that such payment may be provable, in support of the charge, it cannot be received by way of direct proof as an act in the execution of a conspiracy, but as circumstantial evidence tending to show, either the fact of conspiracy, or some of the participants therein. The facts that final entries were made and purchases certified are presumptive if not decisive under the terms of the statutory provisions therefor, known as the Stone and Timber Act, that all proceedings or service required to be performed to that end by either and all of the parties named as conspirators or payees, had been entirely performed when these CERTIFICATES OF PURCHASE WERE ISSUED IN-SO-FAR AS CONCERNS THE CONSPIRACY TO DEFRAUD THE UNITED STATES. If the appellees were engaged as alleged, in a fraud-

ulent conspiracy for that object, and procured the services and action of the several entrymen and the commissioner named as payees respectively, EACH HAD THEN COMMITTED AND COMPLETED EVERY ACT, FRAUDULENT OR OTHERWISE, TO ACCOMPLISH THE ENTRIES AND COMPLETE PURCHASES AS DESIGNED, INCLUSIVE AS OF COURSE, OF THE ALLEGED ENGAGEMENT AND SERVICE FOR WHICH THESE SUBSEQUENT PAYMENTS WERE MADE. Therefore, no occasion remains for further action on the part of either of the conspirators or other persons engaged to effect the object; and no opportunity was open to either conspirator for immunity under the *locus penitentiae* provision of section 5440. WHETHER SETTLEMENTS BETWEEN THE CONSPIRATORS OR WITH AGENTS FOR PROFITS OR SERVICES IN THE CONSPIRACY, WERE THEN OR SUBSEQUENTLY MADE, OR WERE REFUSED, ARE FACTS OF NO MATERIALITY FOR THE OPERATION OF EITHER STATUTE—SECTION 5440 OR 1044.

“We are of the opinion, therefore, that any violation of section 5440 was committed and COMPLETED BEFORE THE CERTIFICATES OF PURCHASE WERE ISSUED, AND THAT NO OVERT ACT IS CHARGED WITHIN THE PERIOD LIMITED BY SECTION 1044, HOWEVER THE AVERMENTS OF THE INDICTMENT ARE CONSIDERED.”

“The contention that the object of the conspiracy was not completed until a patent was issued and delivered is untenable, as we believe, in any view of the effect of the FINAL ENTRIES AND CERTIFICATES OF PURCHASE THERE-

UNDER, FOR THE TWOFOLD REASONS, THAT VIOLATION OF THE STATUTE (a) IN NO WISE DEPENDS UPON THE SUCCESS OF THE CONSPIRACY, AND (b) BECAME COMPLETE (AS BEFORE STATED) WHEN THE FINAL STEP WAS TAKEN ON THE PART OF THE CONSPIRATORS. What course has been or may be adopted by the Land office or other departments in reference to these entries, or in issuing or withholding the formal patents thereupon, is plainly immaterial under this indictment. The general doctrine in reference to public lands subject to entry, appears to be settled, that a tract 'ceases to be subject to the disposal of the United States' when it is entered, paid for and so certified by the Land Office, although no patent has been delivered (*Cornelius v. Kessel*, 128 U. S. 456, 460, 9 Sup. Ct. 122, 32 L. Ed. 482, and *United States v. Schurtz*, 102 U. S. 378, 396, 26 L. Ed. 167; 9 Rose's Notes U. S. 1091); but the status of entries made as averred in the indictment is neither involved nor proper for comment in this opinion."

And as in the *Black case* the last overt acts were in truth and in fact those which preceded the procurement of the check. To make the depositing of the check or exchanging the check for another check a part of this conspiracy charge would be to extend the terms of the indictment, to add to the indictment matters not charged by the Grand Jury.

Insofar as the case of *Ware v. United States*, in 154 Fed. 579, is applicable to the case at bar, it is distinctly in our favor, for the reason that all of the overt acts with which we are now concerned occurred more than three years prior to the filing of the indictment. No

overt act occurred subsequent to May the 26th, 1908. Circuit Judge Sanborn, in that case, lays down this rule, which we invoke here.

"After a careful reading and consideration of these and other authorities, our conclusions are that the true answer to this question is that the existence of the conspiracy and the conscious participation of the defendant therein within the three years are indispensable to the maintenance of such a prosecution; but that, if these facts are established by competent evidence, such a prosecution may be sustained. Proof of the formation by the defendant and others, more than three years before the indictment, of such a conspiracy as that charged in the indictment under which an overt act has been done prior to the three years, is insufficient to sustain the charge of a conspiracy within the three years. But in connection with evidence aliunde of the existence of the same conspiracy, and of the defendant's conscious participation therein within the three years, it is competent evidence for the consideration of the jury in determining the issue presented by the indictment. An overt act committed by one of the alleged conspirators within the three years pursuant to a conspiracy between him and the defendant, formed and followed by an overt act more than three years prior to the filing of the indictment without the defendant's consent or agreement within the three years to the continued existence and to the execution of the conspiracy, is incompetent to establish its existence and his participation therein within the three years."

The *Lonabaugh case*, which was subsequently decided by the Circuit Court of Appeals, clearly recognizes the distinction laid down in the *Ware case*.

In *United States v. Black*, 160 Fed. 431, decided subsequently by Circuit Judge Seaman, does not question the rule in the *Ware case*, but merely holds with the contention "that the object of the conspiracy was not completed until a patent was issued and delivered, is untenable, as we believe, in any view of the effect of the final entries and certificates of purchase thereunder, for the twofold reasons, that violation of the statute (a) in nowise depends upon the success of the conspiracy, and (b) became complete (as before stated) when the final step was taken on the part of the conspirators."

BUT THE REAL OBJECT OF THE CONSPIRACY AS EXPRESSED IN THE INDICTMENT WAS TO SUPPRESS BIDDING AND ENABLE THE PLAINTIFFS IN ERROR TO SECURE THE AWARD, AND THAT OBJECT WAS EFFECTED LONG PRIOR TO THE 26TH DAY OF MAY, 1908.

What was the object of the conspiracy, as set out in the indictment? Was it to cash the check? The indictment does not so state. The real object was to suppress bidding, to enable the defendants to secure the award; and it embraced, as alleged in the indictment, the awarding of the contract for the furnishing of supplies, to the defendants, and the issuance and delivery to them of a check of the Government in payment of such supplies. The overt acts must have even preceded the issuance of that check. It will be borne in mind that this prosecution is not declared upon any substantive offense, but for conspiracy.

The conspiracy in the case at bar was an accomplished one. It did not contemplate the performance of acts through a series of years. It was a conspiracy having for its ultimate object the issuance and delivery of the check. The overt acts towards the accomplishment of this purpose are not set out. The depositing of the check or exchanging it for another check, or taking other money in lieu thereof, was no part of the conspiracy. It is not charged as a part of the conspiracy. It is not charged as one of the ultimate objects of the conspiracy, and the conspiracy must be determined within the four corners of the indictment. The substantive offense indeed was accomplished, at least, on May 26th, 1908, and if the statute had run against the substantive offense, it surely has run against a conspiracy which, under no circumstances, succeeds the substantive offense.

As said in *Hyde v. Shine*, 199 U. S. 82, 50 L. Ed. 97:

“Whatever may be the rule in equity as to the necessity of proving an actual loss or damage to the plaintiff, we think a case is made out under this statute by proof of conspiracy to defraud, and the commission of an overt act, notwithstanding the United States may have received a consideration for the lands, and suffered no pecuniary loss. *MacLaren v. Cochran*, 44 Minn. 255, 46 N. W. 408. The law punishes the false practices by which the lands were obtained, and the question whether the government stands in the position of a bona fide purchaser with respect to the school lands is not one which can be litigated in a criminal prosecution for a violation of law.”

The indictment in this case expressly charges a conspiracy, viz: to obtain the award to the Great Western Smelting & Refining Company of the bids in question.

THE SUBSTANTIVE OFFENSE WAS COMPLETED WITH
THE ACQUISITION OF THE CHECK BY THE PLAINTIFFS IN ERROR.

HOW DOES THE GOVERNMENT PAY FOR SUPPLIES FURNISHED THE NAVY YARD?

When is the transaction with the Government finally closed? This question is conclusively answered by the averments of the indictment itself. On the indictment it clearly appears that the chief clerk, who in this case was Kettlewell, was vested with sundry powers and duties, among them being suggesting and giving of notices to the public that competitive proposals and bids would be received by the Paymaster of the United States Pay Office at Seattle, Washington, for the purchase of supplies for the storekeeper; the preparation of and sending out to the public of proposals, containing specifications of the supplies covered by requisition, and suggesting and devising ways and means of receiving bids and proposals; in recommending the award of, and awarding, contracts to successful bidders; IN SUGGESTING THE APPROVAL OR REJECTION OF THE ACCOUNTS RENDERED TO THE PAYMASTER OF THE UNITED STATES

NAVY PAY OFFICE BY SUCH SUCCESSFUL BIDDER, ACCORDING AS SUCH ACCOUNTS SHOULD BE FAIR AND HONEST, OR FALSE AND FRAUDULENT; in suggesting and recommending the payment, or non-payment, of such amounts, so claimed by such successful bidder to be due him for supplies, according as such claims were honest and fair, or false and fraudulent; and in issuing, mailing and delivering to the successful bidder the check of the Paymaster of the United States Pay Office at Seattle, Washington, for and in payment of the claim of such successful bidder for supplies so forwarded to the storekeeper of the Navy Yard at Puget Sound, Washington.

According to the contention of the Government, Kettlewell did suggest and recommend the payment of this account to the Fowler Metal Company for supplies actually furnished, and did cause to be issued and delivered a check of the Paymaster to the successful bidder in payment of such successful bidder's bill. Kettlewell, according to the indictment (see indictment, page 6), should, with fraudulent intent, send out proposals, which should contain the names of no merchants other than the Great Western Smelting and Refining Company, the Fowler Metal Company, and the W. A. Corder Company, except the names of such merchants who were known to said Kettlewell to be unable to furnish the zinc. (See indictment, page 10.) These proposals were sent out, according to the undisputed testimony of the Government, long before May the 26th,

1908. And Kettlewell was, with fraudulent intent, to examine the bids and proposals, to see whether other merchants had bid thereon; and if they had in fact so bid, he was to manipulate, alter and change such bids so that no persons other than the Great Western Smelting and Refining Company, the Fowler Metal Company, and W. A. Corder and Company should have the contract awarded to them. (See indictment, page 11.) And all these things necessarily have to precede the issuance of the check. And Kettlewell was to recommend and secure the approval of the account, as shown by a certified bill to be filed; and should recommend and secure the issuance from the Paymaster of the United States Navy Pay Office of a check payable to the order of said Fowler Metal Company for the amount due said Fowler Metal Company, and should arrange to have the check delivered to said Silverstone or Emar Goldberg. (See indictment, page 12.) And this was all done long before May the 26th, 1908. The Government, in fact, was defrauded before the issuance of the check. It was defrauded, if at all, upon the approval of the account "showing delivery of zinc, rolled sheet boiler plates, and the acceptance of the same at said Navy Yard at Puget Sound." (See page 12, indictment.) It then became liable for the amount thereof. Its liability being known, it issued the check "in payment of the claim of the successful bidder". Thereupon the transaction was absolutely terminated according to the allegations of the indictment.

The pleader in this case fully realized the difficulties under which he was laboring. He fully realized that his case was barred by the Statute of Limitations, for the indictment fixes the delivery of the check as "on or about June the 1st, 1908". This form of pleading has been condemned in a number of Federal cases, and has never met with approval, especially in cases where time is an ingredient of the offense.

This was plainly recognized in *United States v. McKinley*, 127 Fed. 168. That case cites the case of *U. S. v. Winslow*, 3 Saw. 342, Federal Case No. 16,742, in which it was directly decided that the allegation that a crime was committed "on or about" a certain day does not show but that the action is barred by lapse of time. That is the precise point of contention in the present case. It is our contention that the present indictment was barred by the Statute of Limitations and that the pleader purposely left the time indefinite by using the words "on or about", in order to avoid having the indictment barred by the Statute of Limitations. Judge Bellinger, in the case of *U. S. v. McKinley*, *supra*, recognized this when he said therein:

"The reason for the rule stated is that the words 'on or about' render the time of the offense so uncertain that it does not appear but that the action is barred by the statute of limitations."

Other cases to the same effect are:

State v. Land, 42 Ind. 311;

Dreyer v. The People, 176 Ill. 590, 52 N. E. 372;

State v. Caverly, 51 N. H. 446.

The Government selected that date in order to bring the case within one day from the filing of the indictment. The undisputed evidence in the case shows, as heretofore pointed out, there being no conflict of any kind or character, that this check was delivered on the day it was issued, viz: May the 26th, 1908. It was delivered to Emar Goldberg, acting both for the Fowler Metal Company (a subsidiary concern of the Great Western Smelting and Refining Company), and the Great Western Smelting and Refining Company. That the Fowler Metal Company was an existing concern and a subsidiary concern of the Great Western Smelting and Refining Company, is undisputed. That the bid was put in to the Government in the name of this concern with the consent of the nominal head of the Fowler Metal Company is likewise undisputed.

Section 3722 of the United States Compiled Statutes, 1901, Volume 2, page 2501, permits bids to be made by subsidiary corporations—and, it is discretionary with the navy department to accept or to reject the bids of a party or corporation who has offered more than one bid. This section does not prohibit the offering of more than one bid by a person or corporation. To quote the pertinent words of section 3,722:

"Every contract shall require the delivery of a specific quantity, and no bids having nominal or fictitious prices shall be considered. If more than one bid be offered by any one party, by or in the name of his or their clerk, partner, or other person, all such bids may be rejected; and no person shall be received as a contractor who is not a manufacturer of, or regular dealer in, the articles which he offers to supply. All persons offering bids shall have the right to be present when the bids are opened and inspect the same."

We are concerned here only with the averments of the indictment. The averments are clearly to the effect that Kettlewell should "cause to be issued, mailed and delivered to the successful bidder the check of the Pay Master of the United States Navy Pay Office at Seattle, Washington. FOR AND IN PAYMENT OF THE CLAIM OF SUCH SUCCESSFUL BIDDER FOR SUPPLIES SO FORWARDED TO THE STORE-KEEPER at the Navy Yard at Puget Sound, Washington. (p. 6, Indictment.)

The undisputed facts are that long prior to the 26th day of May, 1908, the Fowler Metal Company was the successful bidder for the supplies in question. These supplies were forwarded to the storekeeper of the Navy Yard at Puget Sound, Washington, and, they being the successful bidder, the check in question was issued and delivered to Emar Goldberg for the Fowler Metal Company and the Great Western Smelting and Refining Company, in payment of the claim for the supplies so furnished; and this check was received in payment

of the claim, and receipt given accordingly.

The check would not, and could not, have been delivered without such receipt. Accompanying the check was a Public Bill, (in evidence), and this bill shows that the check was delivered on May 26th, 1908, as testified to by all of the witnesses, including those of the Government, and the bill stamped "paid" accordingly. The testimony showing that the transaction did not occur. The testimony showing that the transaction occurred on the 26th of May, 1908, and the indictment having been filed five days too late, the Government at the last moment shifted its position by seeking to have it appear that an act done subsequent to the consummation of the conspiracy was an overt act, and should be treated as such. If defendant had been indicted for defrauding the government out of government property, namely, the check, could he have successfully pleaded the non-cashing of the check? Was his crime not complete when he fraudulently obtained it—a negotiable government check, the equivalent of gold coin?

We earnestly submit that the last overt act which effected the real object of the conspiracy, which was the acceptance of the proposal and bid submitted by the conspirators, and the acceptance of the certified bill of the Fowler Metal Company by the Navy Pay Office.

We do not think that even the delivery of the check was properly pleaded as an overt act. The indictment was filed on May 31st, 1911, and surely an act previous to June 1st, 1908, cannot be pleaded as overt act.

As Justice Van Devanter, in the case of *Lonabaugh v. United States*, 179 Fed. 476, said:

“But it is contended that the conspiracy was not limited to the defrauding of the United States of the lands but included the transfer of them to the corporation, and that until both of these things were done the object of the conspiracy was not effected.”

And so it will be contended here,—that the object of the conspiracy was not limited to the prevention of competitive bidding and the sale to the Government of materials at unreasonable prices, and the securing of the issuance of a check in payment thereof, but to the cashing of the check and the division of the spoils amongst the conspirators. We give the same answer as is given in the *Lonabaugh* case:

“The conspiracy came within the interdiction because it had for one of its objects the defrauding of the United States of certain of its public lands, and that object was effected when, as a result of the deceit practiced upon the officers of the land department, the lands were patented to entrymen who were not entitled to them considering the antecedent agreement or obligation in pursuance of which the entries were secured.”

Let us take the facts of the case at bar. Let us assume that we were under indictment for defrauding the Government out of money and it was shown that instead of money we had gotten the check in question. Could we escape? And so in the case at bar, as soon

as the bid was accepted, the award certified, the bill of the Fowler Metal Company ratified and the check issued, the object of the conspiracy, which was to defraud the United States Government, so that the plaintiffs in error should procure from the Government exorbitant prices for certain materials furnished, was consummated, and the crime which was a violation of section 5440 was completed, and from that moment, of necessity, the Statute of Limitations began to run.

In *United States v. Kissel*, 218 U. S. 601, the court clearly emphasizes the distinction between a continuing conspiracy and an accomplished one, and a conspiracy in which the result is continuous over a long period of time. The Court said:

"It also is true of course that the mere continuance of the result of a crime does not constitute the crime."

The application of the *Kissel case* and that of *United States v. Phillips*, *supra*, in which the *Kissel case* is reviewed, is so obvious that only a word is necessary. These cases clearly hold that a continuous conspiracy and a consummated conspiracy with a continuing result are absolutely distinct and different creatures in the eye of the law.

In *United States v. Biggs*, 157 Fed. 264, the Court said:

"Assuming that the indictment does not charge several conspiracies, as above indicated, but that it

was one conspiracy continuous from its formation on August 25, 1899, to the presenting of the indictment, we come to consider the plea of the Statute of Limitations. The first overt act in furtherance of the conspiracy is charged as of date August 25, 1899, and it is insisted by the defendants that, if the indictment charges but the one conspiracy, on the commission of that overt act prosecution could have then been had, and that therefore the statute of limitations began to run as of that date. Against this it is answered that under the doctrine in the *Ware case*, *supra*, every overt act, with 'conscious participation' by the defendants in the unlawful combination, works a renewal of the conspiracy. This may be conceded to be the clear holding in that case; but it is evident that that conclusion was there reached on a consideration of the rules applicable to evidence, and the particular proof then in hand, which is a very different thing from the rules applicable to pleading, in charging a criminal offense. In that case the indictment charged the formation of a conspiracy within the statute, and, if the proof in such a case sustains the charge, it would be no defense for the defendant to show that a like conspiracy had been theretofore formed and overt acts done thereunder prior to the bar. Taking, therefore, the closing part of the indictment as a part of the charge, it appears that the conspiracy charged against the defendants and all of the overt acts charged thereunder, save the last one, were at a time far more than three years before the filing of the indictment. The reasoning of Judge Deady in *United States v. Owen* (D. C.) 32 Fed. 534, impresses me as sound. He there said:

"The general rule is that the statute begins to run from the commission or consummation of the crime. Wharton, Crim. Pl., Sec. 321. When was this crime committed? The conspiracy was formed on July 1, 1881,

and the first act done by any of the conspirators in pursuance thereof was the making of the alleged false affidavits by Ankenny on December 26, 1881, in relation to the character of the land mentioned therein. The crime was then consummated. The two elements of which it is composed—the conspiracy and the act—were accomplished, and the crime committed. On December 27, 1881, more than five years prior to the institution of this prosecution, an indictment might have been found against the defendants for this crime. This being so, the limitation on the right to institution and prosecution therefor began to run at the same time, and became a bar thereto on that day in 1884.’”

“I think this view is also sustained in *United States v. Irvine*, 98 U. S. 450, 25 L. ed. 193.

“But, further, the last overt act is of date May 15, 1906, and it is to the effect that the defendants McPhee and McGinnity did unlawfully request and require William Barth (who was the trustee to take title as charged in the indictment) to execute a certain quit-claim deed conveying title to the lands described in the other overt acts to the corporation named in the charging part, as grantee. Now, the language of section 5440 is, ‘And one or more of such parties do any act to effect the object of the conspiracy.’ It is contended for the Government, and authorities have been cited to that effect, that, if the overt act is charged to have been to effect the object of the conspiracy, it becomes a question for the jury, and not for the court, to say whether such overt act was done to effect the unlawful purpose. But in those cases it does not affirmatively appear from the charge that the overt act could not have had such an effect, while here I think it does appear that this overt act could not by any possibility have been done to effect the object of the conspiracy. Bearing in mind the offense charged, to wit, a conspiracy to defraud the United States, is it not apparent that the mere execution of the deed by Barth to the lands could have no such effect?

I think it is. The evident purpose of the pleader in inserting this overt act in the indictment is an attempt to toll the limitation of the statute."

This case was affirmed on appeal by the United States Supreme Court in *United States v. Biggs*, 211 U. S. 507. The precise question of the Statute of Limitations was, however, not involved.

THE LAST OVERT ACT MUST HAVE OCCURRED PRIOR TO THE RECEIPT OF THE CHECK, FOR THE OVERT ACT CANNOT SUCCEED THE COMPLETION OF THE CONTEMPLATED CRIME.

The United States was surely defrauded after it had issued and delivered its check,—the Government obligation. And there can certainly be no overt act after the conspiracy has been consummated. The conspirators may do many things that are results of their conspiracy with the fruits of their crime, but that does not revive the conspiracy. They may make any use of the fruits of their crime that they see fit; that does not keep the Statute of Limitations alive. Mere transfers of the fruits of a conspiracy have no legal relation to the conspiracy itself. As said in one of the cases, "an overt act presupposes a pending conspiracy, so that an act of any one done in furtherance of the conspiracy may bind all of his associates; when a conspiracy has been completely affected, this implied agency necessarily completely disappears." It is a contradiction of terms to speak of an act done to affect the purpose of a

conspiracy after the conspiracy has been completely accomplished. Such an anomalous doctrine might prolong a conspiracy and would keep it in active operation until every obligation incurred during the formative period of the plot had been liquidated. And, indeed, no case can be found in the books where the overt act succeeds the consummation of the conspiracy. The attempt of the pleader in this case to resuscitate a dead cause of action has been attempted in many other cases with failure.

In *United States v. Ehr Gott*, 182 Fed. 267, the Court said:

“The defendants are clearly right in maintaining that an overt act cannot succeed the completion of the contemplated crime.”

In the case of *United States v. Williamson*, 207 U. S. 453, 52 L. Ed. 297, the Court said:

“As, then, there was no requirement concerning the making in the final proof of an affidavit as to the particulars referred to, and as the entryman who had complied with the preliminary requirements was under no obligation to make such an affidavit, and had full power to dispose *ad interim* of his claim upon the final issue of patent, we think the motive of the applicant at the time of the final proof was irrelevant, even under the broad rule which we have previously in this case applied, and therefore that error was committed not alone in instructing the jury that the indictment covered or could cover the procurement of perjury in connection with the final proof, and that the jury might

base a conviction thereon, but in admitting the final proof as evidence tending to show the alleged illegal purpose in the primary application for the purchase of the lands."

And in the case at bar, over and above our repeated objections and exceptions, the Court permitted testimony long after the consummation of the conspiracy,—indeed, testimony as to acts occurring on the second day of June, 1908. The Williamson case distinctly holds that "it makes no difference how fraudulent the acts of the parties were, they were not admissible to show motive."

The Government is driven into a singular position. It necessarily must admit that prosecution for the obtaining of the check was barred on the 26th day of May, 1911, but nevertheless a prosecution for obtaining money on that check continued to exist until the money was actually obtained; and the Government is forced to contend that the conspiracy continues after the substantive offense has terminated. And the Government is also forced to contend that acts subsequently done by defendants in the way of settlement may be regarded as overt acts.

The principles upon which we contend have been continuously reiterated throughout the reports and from their context, certain conclusions are irresistibly drawn. In the first place, it is clear and certain that the mere allegations in an indictment, that certain facts are objects of the conspiracy, or that certain acts are overt

acts thereof, are immaterial, if, as a matter of law, these facts are not the objects of the conspiracy, or the overt acts alleged do not effectuate the real object of the conspiracy.

Further, the right is granted by these authorities, as a matter of law, to analyze, on an appeal, the facts alleged as objects of the conspiracy and the acts alleged as overt acts, to see whether or not such facts and acts do, or do not, as a matter of law, constitute the object and overt acts respectively.

Again, the distinction must be continually emphasized between a finished and completed conspiracy and its continuing result.

Finally, the principle that the overt acts must precede the consummation of the conspiracy, has become so axiomatic in our Federal Law of Conspiracy, that mention thereof need hardly be made.

Applying the law of the cases to the facts of the case at issue, forces the conclusion that the Statute of Limitations has barred the prosecution in this case. In our analysis of the facts in relation to the law, we will first consider the facts pleaded in the indictment as objects of the conspiracy. The indictment pleads the following facts as objects:

1. That the said Meyer should with fraudulent intent, issue and cause to be issued by the United States Navy Yard a requisition for the purchase for use of a large quantity of zinc.

2. That he should place in said requisition as the estimated price of such zinc a price in excess of the fair market value thereof.

3. That he should place and cause to be placed in said requisition as the time in which the successful bidder should deliver the zinc so short a time of delivery that none but the Great Western Smelting & Refining Company or W. A. Corder & Company could comply with the requirements.

4. That the said Meyer should notify Kettlewell, Goldberg, Corder and Silverstone of the progress of the requisition, so that they would be able to prevent legitimate competition.

5. That Silverstone should represent a certain alleged mercantile establishment (a subsidiary concern of the Great Western Smelting & Refining Company), and should at the proper time file with the United States Navy Office a proposal and bid to furnish materials at a price in excess of the true market value thereof.

6. That when the requisition should reach the United States Navy Pay Office, Kettlewell should send out proposals containing specifications to a list of merchants which should contain the names of no merchants other than the Great Western Smelting & Refining Company, the W. A. Corder Company and the Fowler Metal Company, except names of merchants known to be unable to furnish the articles.

7. That Kettlewell should, with fraudulent intent, examine the bids and so manipulate the bids of others that the contract should be awarded to the Great Western Smelting & Refining Company, W. A. Corder & Company, or the Fowler Metal Company.

8. That Kettlewell should recommend to the Pay Master of the United States to have accepted, and should arrange to have accepted, the bid and proposal of the Fowler Metal Company.

9. That Meyer should arrange to have the zinc which would be forwarded to the United States Navy Yard at Puget Sound, Washington, accepted without question, and that Kettlewell should thereupon recommend and secure the approval of the account, AND SHOULD RECOMMEND AND SECURE THE ISSUANCE BY THE PAY MASTER OF THE UNITED STATES NAVY OF A CHECK, PAYABLE TO THE ORDER OF THE FOWLER METAL COMPANY, FOR THE AMOUNT APPEARING TO BE DUE THE SAID FOWLER METAL COMPANY, AND SHOULD ARRANGE TO HAVE SAID CHECK DELIVERED TO SAID E. SILVERSTONE OR SAID EMAR GOLDBERG.

The succeeding allegation is merely a repetition of what follows, and is merely a conclusion of law as to what was the object of the conspiracy. These mere conclusions of law do not add to the indictment. The

charging part of the indictment alone controls. The conspiracy—the charging part of the indictment, commences at page 2 of the transcript and terminates with the name “Goldberg” appearing upon page 12. All that follows, aside from the overt acts, is merely descriptive as to the purpose of the scheme, which is elaborately set out.

The pleader in this case has completely overlooked the plain distinction of law between the substantive offense and the offense of conspiracy. In the case at bar, let us ask, “what is the substantive offense?” The substantive offense was not the cashing of the check. The substantive offense, if the indictment is to be believed, was to gain physical possession of the check. This necessarily had to be preceded by its issuance. The conspirators ceased concerning themselves over the transaction the moment the check was delivered. They had gained that which they had sought to gain. They had accomplished the very purpose of their conspiracy, and the mere cashing of the check was to enable them to settle with their co-conspirators. It is unnecessary to waste any further time upon this subject. It must be conceded that the overt act should be directed to the attainment of the object of the conspiracy. And when that object is attained, the object of the conspiracy in the sense of the statute is effected.

And the indictment clearly points out that the object of the conspiracy was to sell to the Government materials at unreasonable prices, and to receive therefor

the Government's check in payment. If this check had been lost, and the conspirators had taken steps to find it, had inserted an advertisement in some newspaper, would this act be one in furtherance of the conspiracy? If one of the co-conspirators had caused the check to be certified by the bank upon which it was drawn, would it be an act in furtherance of the conspiracy?

What has the depositing of the check to do with making the Great Western Smelting & Refining Company the successful bidder? They were successful bidders long prior to the depositing of the check. What had the cashing of the check to do with the acceptance of their bid? Their bid was accepted long prior to the cashing of the check. What had the cashing of the check to do with the awarding of the contract to the Fowler Metal Company? This contract was awarded long prior to the issuance of the check. What had the depositing of the check to do with the acceptance of the goods by the government? These goods were accepted long prior to the issuance of the check. Every single act of con-

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issuance of the check. What had the cashing of the check to do with the acceptance of the goods by the government? These goods were accepted long prior to the issuance of the check. Every single act of confederacy against the Government in this particular transaction was completed long prior to the cashing of the check. The Government had the materials for the purchase of which it had contracted, and had delivered the check in payment therefor, and the check was accepted in payment therefor. The transaction was not only closed in point of fact, but was closed upon the books of the Government. The Government's books show that on the 26th day of May, 1908, this check was issued in payment of these goods, and thus the transaction was absolutely completed.

THE FACT THAT ONE OF THE BIDS WAS IN THE NAME OF THE FOWLER METAL COMPANY, A SUBSIDIARY CONCERN OF THE GREAT WESTERN SMELTING & REFINING COMPANY, DID NOT RENDER SUCH BID ILLEGAL, OR AGAINST THE POLICY OF THE LAW.

In order to escape the importunities of Kettlewell, who was doing business with the Government under assumed names, selling the Government supplies under the names of Peter Brandt, and Smith-Hunt & Company, Mr. Goldberg, with the consent of the head of the Great Western Smelting & Refining Company, bid on the materials in the name of the Fowler Metal Company. Section 3722 of the Revised Statutes permits this as shown.

The testimony afterwards quoted shows that the Fowler Metal Company was engaged in a similar business to that of the Great Western Smelting & Refining Company; and even if the bid was in the name of a clerk of the Great Western Smelting & Refining Company, it would not have been unlawful. The bid would merely have been rejected.

ACCORDING TO THE TERMS OF THE INDICTMENT, AND OF ALL RULES OF COMMON SENSE, THE OBJECT OF THE CONSPIRACY WAS ATTAINED BY THE RECEIPT OF THE CHECK, BECAUSE THE CHECK CONSTITUTED PAYMENT, AND NO FURTHER RELATIONS WITH THE GOVERNMENT WERE NECESSARY AFTER ITS DELIVERY.

In civil cases, the Statute of Limitations has been held to run from the date of payment by check, and not from the date upon which the check is cashed. How, therefore, can the subsequent handling of this government obligation affect the conspiracy or extend the statute of limitation?

In *McCluny v. Silliman*, 28 U. S. 269, Mr. Justice McLean said:

“Of late years the courts of England, and in this country, have considered statutes of limitations more favorably than formerly. They rest upon sound policy, and tend to the peace and welfare of society. The courts do not now, unless compelled by the force of former decisions, give a strained construction, to evade the effect of those statutes. By requiring those who complain of injuries to seek re-

dress by action at law within a reasonable time, a salutary vigilance is imposed, and an end is put to litigation."

EVERY PRESUMPTION FAVORS THE PROPOSITION THAT THE CHECK CONSTITUTED PAYMENT AND THUS COMPLETELY TERMINATED ALL TRANSACTIONS BETWEEN THE GOVERNMENT AND THE PLAINTIFFS IN ERROR.

An exceptionally strong indication in favor of the presumption that the check concluded the conspiracy because it constituted final payment, is to be found in the way such obligations are treated by the United States Government itself. How the Government deals with its obligations of this nature is best shown by section 306 of the Compiled Statutes of 1901. These sections read as follows:

"Sec. 306. **LIABILITIES OUTSTANDING THREE OR MORE YEARS.**—At the termination of each fiscal year all amounts of moneys that are represented by certificates, drafts, or checks, issued by the Treasurer, or by any disbursing officer of any Department of the Government, upon the Treasurer or any assistant treasurer, or designated depository of the United States, or upon any national bank designated as a depository of the United States, and which shall be represented on the books of either of such offices as standing to the credit of any disbursing officer, and which were issued to facilitate the payment of warrants, or for any other purpose in liquidation of a debt due from the United States, and which have for three years or more remained outstanding, unsatisfied, and unpaid, shall

be deposited with the Treasurer, to be covered into the Treasury by warrant, and to be carried to the credit of the parties in whose favor such certificates, drafts, or checks were respectively issued, or to the persons who are entitled to receive pay therefor, and into an appropriation account to be denominated 'outstanding liabilities.'

In other words, applying to the case at bar, if the check was not cashed within three years by the conspirators, by operation of the law the money due them from the Government would be placed to their account in the United States Treasury, and would remain there to their account just as if they had deposited the money there as in a bank, or had a certified check accepted by a bank. Nothing had to be done by them to cause this to be done. It would have been done by force of these sections,—sections 306-308 of the Compiled Statutes to be done. It would have been done by force of this section—section 306 of the Compiled Statutes of 1901.

The United States Treasury is always solvent and secure, so that the money is always secure; while a private bank cannot be relied on for anything near such security and solvency. In the light of these circumstances, was there any need for haste on the part of the defendants here to cash their check?

THE GOVERNMENT RECEIPT WAS EVIDENCE THAT THE CHECK CONSTITUTED ABSOLUTE AND NOT CONDITIONAL PAYMENT OF THE CLAIM.

The charge in the indictment is that the defendants conspired together to obtain this precise Government

check, and surely payment by check of the United States Government raised a presumption of absolute payment, especially in a criminal case, and the benefit of the doubt is given to the defendants. We have not only the delivery of the check itself, but we have the further proof that on May the 26th, 1908, a receipt was given for the check and the bill was marked "paid." Here we find an absolute agreement upon the part of the defendants to receive the check as payment of the account. These facts conclusively show the check was given as absolute payment, and was tendered and received as absolute payment of the claims of the defendants.

The evidence in this case conclusively shows that the receipt of the check absolutely terminated the transaction between the conspirators and the government, because it clearly appears that the check was accepted as absolute and final payment of the claim in question.

The receipt is most conclusive evidence that the check was received in payment. In many doubtful cases such a receipt has absolutely thrown the decision in favor of the parties presenting that point. In *Fowler v. Ludwig*, 34 Me. 455, Chief Justice Shipley said:

"The facts relied upon to repel and overcome the presumption of payment and the corroborative testimony, were not deemed sufficient to authorize the court to determine that the orders were not received in payment."

In this case a receipt was introduced in evidence to show that the check was received as payment.

In *Real Estate Bank v. Rawdon*, 5 Ark. 558, at page 569, the Court, by Mr. Justice Dickenson, said:

"It is perfectly clear that if the principal settles with the agent on the faith of a receipt in full as for money, he is entirely discharged. Does the form of the receipt vary the principle? The receipt here is as if the security were an absolute payment for Rawdon, Wright and Hatch received for the notes precisely as they received for the money. They realized the principle and elected to take the checks respectively, and each, upon the faith of the receipt, settled with the principal, the bank. No doubt taking a note for a pre-existing debt is not conclusive evidence of payment unless it is expressly agreed to be taken as payment, and at the risk of the creditor. (*Tobey v. Barber*, 1 J. R. 68; *Arnold v. Camp*, 12 J. R. 407.) Did the receipt here warrant the bank in settling with Williamson? No receipt is conclusive evidence of absolute payment. A receipt in full by cash may be explained or contradicted as well as a receipt in full by note. In many cases it has been held that the presumption that the check was intended as payment arose from the evidence of the acts of the parties in giving and receiving the check."

In *Archibald v. Argall*, 53 Ill. 307, the Court said:

"It is the established doctrine in this court that the mere giving of a note does not of itself extinguish a precedent debt, whether it be an account or other demand. *Rayburn v. Day*, 27 Ill. 46; *White v. Jones*, 38 Ill. 159. In such a case, it is a question of intention. It is true, the intention need not be manifested by an express agreement, but may be inferred from the circumstances attending the transaction, and is a question for the jury."

In *Bailey v. Partridge*, 34 Ill. 188, 27 N. E. 89, it is said:

"If it be true that the check was given as intimated in this letter, and it was accepted as payment, and a receipt given showing full payment, nothing more was required to establish *prima facie* payment."

In *Blair v. Wilson*, 28 Grat. 165 (Va.), a check was given and received as cash, and credited to the debtor as cash, and the creditor deposited the check the day it was received. It was not paid, owing to the evacuation of Richmond by the Confederate Army and the subsequent fire. It was held that if there was any doubt as to the intention of the parties in this giving and receiving the check, it was a question for the jury. The court said:

"While, however, the giving of the check by a debtor to his creditor is generally presumed to be only a provisional or conditional payment of the debt, for which it is given, yet such check by agreement between the parties may be given and received in full payment and absolute discharge and satisfaction of the debt.

"I do not find this proposition controverted anywhere except in New York, where it seems to be held that such an agreement is invalid because without consideration. The authorities in all the other States seem to uphold such an agreement when made. In some of the cases it is said the agreement must be 'express;' in others it must be 'special;' while in many others it is said that it may be either 'express or implied.' The authorities touching such

agreements are collected and classified in 2 Parsons on Bills and Notes, 159, 160, 161, 162, Note T, and as there given, relate mostly to bills of exchange and promissory notes. I see no good reason, however, why the rule should not apply as well to a check as to a bill or note, nor why the agreement may not as well be implied as expressed."

In *Bullion & Exchange Bank v. Hegler*, 93 Fed. 890, Judge Morrow on page 894 said:

"It is now well settled by the authorities that the statute of limitations is to be upheld and enforced, not as arising merely upon the presumption that from lapse of time the debt has been paid, or released, but upon the broad ground that it is a statute of repose, for the peace and welfare of society, and is therefore to be regarded favorably. *Bell v. Morrison*, 1 Pet. 351, 360; *McCluny v. Silliman*, 3 Pet. 270; *Shepherd v. Thompson*, 122 U. S. 231, 234, 7 Sup. Ct. 217; *Spring v. Gray*, 5 Mason 305, 22 Fed. Cas. 978, 984; *McCornish v. Brown*, 36 Cal. 180, 184."

See, also,

Wood on Statute of Limitations, 3d Ed., Sec. 4;
Merrill v. Monticello, 66 Fed. 165.

The statute as applied to criminal prosecutions is no less based on sound principles of public policy and wisdom than when applied to the limitation of civil actions. In *Wood on Statute of Limitations*, 3d Ed., Sec. 13, it is said:

"In reference to crimes, where the Statute fixes a period within which an indictment for certain

offenses shall be found, while perhaps it cannot technically be said that the criminal, by the lapse of the statutory period, has acquired a vested right under the statute, yet it may be said that the State, though retaining the power to prosecute and punish for the crime at any time before the statute has run thereon, yet by neglecting to do so, is to be treated as having condoned the crime, so that it is afterwards estopped from prosecuting for it, as much as it would be from withdrawing an absolute and unconditional pardon after it had once been granted and delivered. But it has recently been held by a court of high authority that the same principle applies in this respect in criminal as in civil cases."

The learned author here refers to the case of *Moore v. State*, 40 N. J. L. 384, and quotes from the opinion of J. Dixon therein, in the following note:

"The statute of limitation, in declaring that no person shall be prosecuted, tried, or punished for an offense, unless the indictment be found within two years after the crime, in effect enacts that when the specified period shall have arrived the right of the State to prosecute shall be gone and the liability of the offender to be punished—to be deprived of his liberty—shall cease. Its terms not only strike down the right of action which the State had acquired by the offense, but also removes the flaw which the crime had created in the offender's title to liberty. In this respect its language goes deeper than statutes barring civil remedies usually do. They expressly take away only the remedy by suit, and that inferentially is held to abate the right which such remedy would enforce, and perfect the title which such remedy would invade; but this statute is aimed directly at the very right which the

State has against the offender, the right to punish, at the only liability which the offender has incurred, and declares that this right and this liability are at an end. Corresponding provisions in a statute concerning lands would undoubtedly be held to extinguish every vestige of right in him who had not asserted his claim, and to perfect the title of the possessor. Giving them the same force regarding crimes, they annihilate the State's power to punish and restore the offenders' rights to their original status." See *Dinckerlocker v. Marsh*, 75 Ind. 548.

Another note reads as follows:

"Statutory Crimes, S. 266. The doctrine stated by this test-writer is not only without any foundation in reason, but is also wholly unsustained by authority. Dixon, J., in the case last cited, in commenting upon this statement pertinently said: 'Evidently this doctrine would upset the uniform train of decisions in civil cases, and moreover it would be a strained and unnatural construction of our act, to say that it simply withholds jurisdiction from the courts. Its language is "no person shall be prosecuted, tried, or punished." It does not relate to the courts but to the person accused. The answer, which under it the respondent must make to an accusation before the tribunal which once had the right to punish him, is not that the court has no jurisdiction to inquire into his guilt or innocence and pass judgment, but that after inquiry the court must pronounce judgment or acquit. And probably no one would contend that, after such judgment, any change in the law would legally subject the defendant to a second prosecution. Yet an acquittal by a court without jurisdiction is void. 1 Hawkins, P. C. C. 35. It cannot be maintained, then, that the act impairs jurisdiction.'"

A very recent expression on this subject is to be found in the case of *Gompers v. United States*, Advance opinions United States Supreme Court, October term 1913, page 696, in which the Supreme Court of the United States said:

"The power to punish for contempt must have some limit in time, and in defining that limit we should have regard to what has been the policy of the law from the foundation of the government. By analogy, if not by enactment, the limit is three years. The case cannot be concluded otherwise so well as in the language of Chief Justice Marshall in a case where the statute was held applicable to an action of debt for a penalty. *Adams v. Woods*, 2 Cranch. 336, 340-342, 2 L. ed. 297-299: 'It is contended that the prosecutions limited by this law are those only which are carried on in the form of an indictment or information, and not those where the penalty is demanded by an action of debt. But if the words of the act be examined, they will be found to apply not to any particular mode of proceeding, but generally to any prosecution, trial, or punishment for the offense. It is not declared that no indictment shall be found . . . But it is declared that "No person shall be prosecuted, tried, or punished." . . . In expounding this law, it deserves some consideration, that if it does not limit actions of debt for penalties, those actions might, in many cases, be brought at any distance of time. This would be utterly repugnant to the genius of our laws. In a country where not even treason can be prosecuted after a lapse of three years, it could scarcely be supposed that an individual would remain forever liable to a pecuniary forfeiture.' "

The question of whether or not the statute of limitations has run must be tested by the averments of the indictment concerning the alleged conspiracy, and it clearly appears from these averments that the conspiracy was to enable the Great Western Smelting & Refining Company and the W. A. Corder Company to have their bid accepted without question, and to secure the approval of the amount of their bid by the proper officials of the Government, and to secure the recommendation and issuance by the paymaster of a check payable to the order of the Fowler Metal Company, a subsidiary concern of the Great Western Smelting & Refining Company, and the delivery of that check to either Silverstone or Emar Goldberg. The indictment reads:

“That said J. A. Kettlewell should recommend to the Paymaster of the United States Navy Pay Office at Seattle, Washington, and arrange to have accepted the bid and proposal of said Fowler Metal Company so to be offered and filed by the said E. Silverstone, and should arrange to have awarded to said Fowler Metal Company the contract for the furnishing of said zinc, rolled sheet, boiler plates, so to be requisitioned, as aforesaid; that said Edwin F. Meyer should arrange to have said zinc, rolled sheet, boiler plates, which would be forwarded to the United States Navy Yard, Puget Sound, by said Great Western Smelting and Refining Company and said W. A. Corder Company in fulfillment of the Fowler Metal Company contract, accepted without question, and said J. A. Kettlewell should recommend and secure the approval of the account as shown by a certain certified bill to be filed, and

caused to be filed, by said E. Silverstone, with the United States Navy Yard, Puget Sound, Washington, purporting to be the certified bill of the Fowler Metal Company, showing delivery of said zinc, rolled sheet boiler plates, and the acceptance of same at said Navy Yard, Puget Sound, and that none of said zinc, rolled sheet boiler plates had been paid for, and should recommend and secure the issuance by the Paymaster at the United States Navy Pay Office at Seattle, Washington, of a check payable to the order of the said Fowler Metal Company for the amount appearing to be due the said Fowler Metal Company according to the account so to be rendered as aforesaid, and should arrange to have said check delivered to said E. Silverstone or said Emar Goldberg."

(Indictment, pp. 11-12, Trans.)

The crime in this case was consummated in point of fact before the issuance of the check, the issuance and delivery of the check being RESULTS ONLY of the conspiracy. Under the decisions of the Supreme Court of the United States, in *U. S. v. Williamson*, 207 U. S. 425, and in the later case of *United States v. Biggs*, 211 U. S. 507, we are satisfied that this contention cannot be successfully disputed. In all of these cases the alleged co-conspirators were still acting, but acting amongst themselves, and not conspiring against the Government.

The approximate object of the conspiracy was the obtaining of the award and the delivery of the check, and this we have shown was accomplished on May the 26th, 1908. Unquestionably, the depositing of this check

and obtaining something in lieu thereof, was a mere result of the conspiracy, and not a part of the conspiracy itself. This is clearly pointed out in *United States v. Kissell*, 218 U. S. 601, in which a crime is distinguished from its results.

The indictment in this case alleges that the conspiracy was continuously in process of execution from about the first day of April, 1908, to and including the second day of June, 1908. It clearly appears, however, from the indictment itself, and the undisputed proofs that in April, 1908, the materials sold to the Government were in the possession of the defendants; that a requisition was placed in April, 1908; that proposals and bids were filed in April, 1908; the recommendation to the Paymaster to have accepted the bids and proposals were filed in April, 1908; and that all these acts were done long before the delivery of the check, which way May the 26th, 1908.

The alleged overt acts set out in the indictment deal with nothing other than the check. The last overt act set out in the indictment that Goldberg on or about the 1st day of June, 1908, had in his possession a check, surely is not an overt act in furtherance of any conspiracy. Nor did the fact that Silverstone, on the 1st day of June, 1908, deposit the check in the bank, have anything to do with the conspiracy. No single overt act is set forth in the indictment which had for its object the carrying out of the alleged conspiracy set out in the indictment. The indictment, on its face, showing

that this check was delivered on or about June the 1st was asserted to avoid the bar of the statute, the proof showing that it was delivered on May the 26th. Instead of the possession and delivery of the check being an act to further the conspiracy, it was a mere result flowing from the conspiracy.

Unless this be true, then the Court must hold that every result of a conspiracy is an overt act. If at any time a conspirator has in his possession the avails of a crime, so long as he has these avails he may be subject to prosecution for conspiracy, although the substantive offense may be barred.

Admittedly, in this case, the substantive offense of presenting a false claim against the Government was barred by the Statute of Limitations long before May the 31st, 1911.

The introduction in evidence of the cashing of the check was absolutely immaterial evidence, as the cashing of this check did not tend to accomplish the object of the conspiracy, which was to procure the award for the lot of materials to the defendants, and perhaps the obtaining of the check. What had the cashing of this check to do with the obtaining of this award? What had the cashing of this check to do with the delivery of the check? What relation did it bear to the conspiracy set out in the indictment?

In *Fain v. United States*, 209 Fed. 531 (1913), the Circuit Court of Appeals, for the eighth circuit, said:

“There are many reasons why the two statements in the affidavits regarding the sales of the property to Smith and Hennold, respectively, even if false, were immaterial. They did not tend to accomplish the object of the conspiracy to keep the land out of the public domain and beyond the reach of other entrymen; but if they had any tendency, it was to remove the existing entries, and to open the land to entry by others. Moreover, it was not material whether the homesteaders had sold their relinquishments or not; for, if they had, they had the right to purchase them again and to maintain their homestead rights and their entries until the latter were cancelled by contests or by the filing of their relinquishments. The false statements were not material to prove perjury because they related to an immaterial issue, and because that offense was not charged in the indictment and its commission was not in issue. It is not a criminal offense for a litigant to delay the administration of the law by asserting, even under oath, in his pleading or proof the existence of a fact which did not exist. If it were, one or the other of the parties in many a contested lawsuit would either be deterred from asserting the existence of facts, the proof of which would be essential to his rights, but doubtful, or would be liable to punishment for asserting their existence if he failed to prove them. No sound reason is discovered for the introduction in evidence or the consideration by the jury of the affidavits and contests of the entries of Kammerer, Strunk, or Rogers, or of their relinquishments or of the entries themselves.

They should have been excluded from the consideration of the jury in the trial below."

* * * * *

"Over the objection of Fain that it was incompetent evidence against him, a letter to Babb was received in evidence, which had been written by Baker on October 14, 1910, 23 days after Babb's relinquishment was filed and his land was entered by Jenkins, in which letter Baker stated his sale of Babb's relinquishment, and that as soon as he could cash out, he would add up Babb's notes and the amounts of cash he had loaned him, and if they could get any balance, would send it to him. The letter was not competent evidence against Fain, because it was not written to effect the object of the alleged conspiracy, but to narrate how that object had been attained after it has been reached, and such a narration by a co-conspirator is no evidence against his fellow. While the act of one conspirator in the prosecution of the enterprise is, after proof of the conspiracy, evidence against all, his admissions in his narration of past events after the conspiracy has come to an end, either by success or failure, are inadmissible in evidence against his co-conspirators. *Logan v. United States*, 144 U. S. 263, 309, 12 Sup. Ct. 617, 36 L. Ed. 429; *Brown v. United States*, 150 U. S. 93, 98; 14 Sup. Ct. 37, 37 L. Ed. 1010; *Lonabaugh v. United States*, 179 Fed. 476, 103 C. C. A. 56, 61."

The rule is well established that after a conspiracy has come to an end, whether by success or failure, the admissions of one conspirator by way of narrative of past facts are not admissible in evidence against the others.

Was not the United States defrauded when the check was delivered? The answer must be in the affirmative. And this being so, did not the conspiracy to defraud terminate prior to that time?

2.

THE COURT COMMITTED PREJUDICIAL ERROR IN OVER-RULING THE PERSISTENT OBJECTION OF THE DEFENDANTS TO EVIDENCE AS TO SALES OF ZINC AT VARIOUS TIMES TO VARIOUS PURCHASERS, FOR THE PURPOSE OF ESTABLISHING THE REASONABLE VALUE OF THE ZINC SOLD TO THE GOVERNMENT.

The charge in the indictment was that the fraudulent scheme contemplated a requisition for the purchase for use in the Navy Yard of a large quantity of zinc, rolled sheets and boiler plates, and should place and cause to be placed in said requisition on the estimated cost of said zinc, rolled sheets and boiler plate a price in excess of the fair market value thereof. It was the theory of the pleader that the schemes of the defendants were to obtain for themselves unreasonable and unconscionable profits.

The sale to the Government was made between the first day of April and the 26th day of May, 1908. The government had been defrauded by having foisted upon it, under its claim, materials at unreasonable prices in exchange for a check delivered on May 26, 1908.

To prove that we have made unreasonable profits, the Government introduced in evidence a large num-

ber of sales sheets of the Great Western Smelting & Refining Company's books, showing sales of zinc to various customers and customers of that concern at times long prior to the date of the sale to the Government of the zinc in question. The Government was also permitted to show sales to customers of the Corder Company for the same purpose. This testimony was constantly objected to and the objections overruled.

IT WAS NOT SHOWN BY THE GOVERNMENT THAT THE OTHER SALES OFFERED BY IT IN EVIDENCE TOOK PLACE UNDER THE SAME CONDITIONS OR WERE SUBJECT TO THE SAME CIRCUMSTANCES AS THE SALE OF THE ZINC IN QUESTION. ON THE CONTRARY THE CONDITIONS AND CIRCUMSTANCES WERE SHOWN BY THE EVIDENCE TO BE FUNDAMENTALLY DIFFERENT.

The zinc furnished in the case at bar was of a peculiar kind and dimensions. As shown by the testimony of Mr. Nagus, the prices of zinc fluctuated from time to time, particularly during the six months preceding this sale to the Government. The Government, before purchasing this zinc from the Great Western Smelting & Refining Company, endeavored to purchase it from the only manufacturer who had it, the Matheson & Heggler Zinc Company, and their offer to purchase was declined. Mr. Nagus' testimony follows:

“MR. ALLEN.—Well, give then the specification of the plates.

"MR. SCHLESINGER.—'5,000 pounds $\frac{1}{2}$ by 24 by 28 inches; 5,000 pounds $\frac{1}{2}$ by 24 by 26 inches; 5,000 one inch by 26 by 36 inches; 4,000 one inch by 24 by 48 inches. Referring to the last item will say that the largest we can furnish of one inch plate is 24 by 36, and we therefore telegraphed you accordingly, as per enclosed press copy, at the same time quoting you \$5.08 La Salle for the additional carload, less the usual discount, and your mention that we intend to allow this price to apply on present carload orders. We would add that in quoting prices on rolled zinc plates the same are always for prompt acceptance, excepting when same is contingent upon the awarding of contracts by the Government, and while we are able to give you a reduction in price on the present order, at times market may advance where the order is not placed promptly, owing to fluctuations in the spelter price. We await your reply with reference to one inch plates and hope to be favored with your order for additional carloads.'

"Q. What do you mean by the phrase here 'owing to fluctuations in the spelter price'? What is spelter?

"A. Spelter is pig zinc.

"Q. Spelter is pig zinc. Do you manufacture zinc?

"A. We do, yes.

"Q. And the price of spelter, which was the basic material, those prices fluctuated from time to time?

"A. Yes, sir.

* * * * *

"MR. SCHLESINGER.—As a matter of fact, in selling to the Great Western Smelting Company at various times, did not your price, as shown by these letters, fluctuate?

"A. Yes.

"Q. From between six to \$7.40 per hundred pounds?

"A. Yes, that is right.

"Q. And, for all that you know, they might still fluctuate and become higher in the future, dependent upon trade condition?

"MR. SCHLESINGER.—So far as you know, without being able to dip into the future, because you have no prophetic vision, they might still further fluctuate and become higher or lower as conditions warrant?

"A. Yes, sir.

"Q. You are not able to say now, are you, with any degree of definiteness, what you will sell these plates for three months hence?

"A. No.

"Q. In other words, as a man of common sense, you know that any business man might expect fluctuations in prices for merchandise?

"A. Yes.

"Q. If there is an over-demand and a small supply prices raise, do they not?

"A. Yes.

"Q. If there is a large supply and a small demand prices lower, do they not?

"A. Generally speaking, yes.

Hiram S. House testified that he was an expert bank accountant for the Department of Justice. (P. 530, Trans.) He was handed the Great Western Smelting & Refining Company's book, "Government Exhibit 28," the same being the receiving book of the Great Western Smelting & Refining Company. (Trans., p. 535, Assignments of Error, Trans., p. 1455.) His at-

tention was then called to various sales sheets contained therein, and he was asked to state by referring thereto the various prices paid for zincs at various other times than those stated in the indictment, at the dates upon which the zincs in question were bought. (Trans., p. 537, Assignments of Error, Trans., p. 1456.) His testimony was objected to upon the ground that Mr. House was not a man knowing values, but simply an expert accountant, and that his testimony as to the value of goods at other times than the one in question, or even of goods at the time in question, was not competent evidence, not only because Mr. House was merely an expert accountant and did not know values, but because the conditions existing at those times were not shown by the exhibits in question. (Trans., p. 541, Assignments of Error, Trans., p. 1457.) The testimony, however, was admitted, and Mr. House testified that the books showed that on September 4th, 1907, sales of zinc to the John Simms Metal Works were made of 4587 pounds at \$9.50. Continuing to read from the books, he testified that the same showed a sale on September 4th, 1907, to the Pacific Engineering Company of 1036 pounds at \$9.55—\$958.44. (Trans., p. 542, Assignments of Error, Trans., p. 1458.) In the same manner the witness went on to testify as to the prices paid in numerous other instances for zincs of numerous other sizes and numerous other qualities at various times from September 4th up to March 21st, 1908. (Trans., pp. 542-569, Assignments of Error, Trans., pp. 1458-

1470.) He testified in the same manner from the sales sheets of the W. A. Corder Company. (Trans., p. 547, Assignments of Error, Trans., p. 1459.) His testimony showed that many of the firms to whom zincs were sold at various other times were jobbers or private individuals, while the United States Navy Yard was neither one nor the other and different conditions applied where zincs were sold to jobbers or to private individuals. (Trans., pp. 549-553, Assignments of Error, pp. 1461-1463.) Moreover, it appeared that zincs sold to the government had to be shipped in paper boxes, separate, across the Sound, while those to jobbers and to private individuals were not required to be forwarded in the same manner as those to the Navy Yard. (Trans., p. 549, Assignments of Error, Trans., p. 1462.)

The importance of this evidence on the minds of the jury is clearly evidenced by the fact that some of the jurors particularly inquired as to the dates of the various transactions. Here the jury were given evidence of sales of zinc starting on September 4th 1907; in other words, the Government was allowed to show sales occurring eight months prior to the transaction in question,—sales to jobbers, with the conditions of the market practically unknown, supply and demand not being referred to,—and this for the purpose of showing that we had charged the Government an unconscionable profit. We have all along contended that the Government did not pay an unreasonable profit for the zinc in question. The next sale in point of date was November

the 20th, 1907, the kind of zinc plates not being similar either in size or quality, so far as disclosed by the testimony. This testimony, we submit, was covered by various objections, and was exceedingly prejudicial. The same question arose in the case of *In re Thompson*, 28 N. E. 390, before the Court of Appeals of New York, and Justice Parker, delivering the opinion of the Court, said:

"This question has been presented to courts of last resort in several of the States, but not with the same result. In Massachusetts, New Hampshire, Illinois, Iowa and Wisconsin it is held that actual sales of other similar land in the vicinity, made near the time at which the value of the land taken is to be determined, are admissible as evidence for the purpose of arriving at the amount of compensation. *Gardner v. Brookline*, 127 Mass. 358; *Packing etc. Co. v. City of Chicago*, 111 Ill., 651; *Town of Cherokee v. Land Co.*, 52 Iowa 279; 3 N. W. Rep. 42; *Railroad Co. v. Greely*, 23 N. H. 242; *Washburn v. Railroad Co.*, 59 Wis. 364, 18 N. W. Rep. 328. While in some of the other jurisdictions, notably Pennsylvania, New Jersey, Georgia, and California, it is held that sales of similar property are not admissible for the purpose of proving the value of property about to be taken. *Railroad Co. v. Hies-ter*, 40 Pa. St. 53; *Railroad, etc., Co. v. Bunnell*, 81 Pa. St. 414; *Railroad Co. v. Ziemer*, 124 Pa. St. 560, 17 Atl. Rep. 187; *Railroad Co. v. Benson*, 36 N. J. Law. 557; *Railroad v. Pearson*, 35 Cal. 247-262; *Railroad Co. v. Kieth*, 53 Ga. 178. The reasons assigned for the conclusion reached in the cases last cited are, in the main, that the test in legal proceedings is, what is the present market value of the property which is the subject of controversy?

It may be shown by the testimony of competent witnesses, and on cross-examination, for the purpose of testing their knowledge respecting the market value of the land in that vicinity, they may be asked to name such sales of property, and the prices paid therefor, as have come to their attention. But a party may not establish the value of his land by showing what was paid for another parcel similarly situated, because it operates to give to the agreement of the grantor and grantee the effect of evidence by them that the consideration for the conveyance was the market value, without giving to the opposite party the benefit of cross-examination to show that one or both were mistaken. If some evidence of value, then *prima facie* a case may be made out, so far as the question of damages is concerned, by proof of a single sale, and thus the agreement of the parties which may have been the result of necessity or caprice would be evidence of the market value of land similarly situated, and become a standard by which to measure the value of land in controversy. This would lead to an attempt by the opposing party to show,—First, the dissimilarity of the two parcels of land; and, second, the circumstances surrounding the parties which induced the conveyance,—such as a sale by one in danger of insolvency, in order to realize money to support his business, or a sale in any other emergency which forbids a grantor to wait a reasonable time for the public to be informed of the fact that his property is in the market; or, on the other hand, that the price paid was excessive, and occasioned by the fact that the grantee was not a resident of the locality, nor acquainted with real values, and was thus readily induced to pay a sum far exceeding the market value. Thus each transaction in real estate claimed to be similarly situated might present two side issues, which could be made the subject of as vigorous contention as the main issue, and, if the trans-

actions were numerous, it would result in unduly prolonging the trial, and unnecessarily confusing the issues, with the added disadvantage of rendering preparation for trial difficult.

"Our attention has not been called to a case in this court where the question has been passed upon in the manner here presented, but there are a number of decisions indicating the tendency of the court to be against proving value by evidence of the selling price of similar property. In *Huntington v. Attrill*, 118 N. Y., 365, 23 N. E. Rep. 544, the defendants attempted to prove the value of certain seaside property by showing the value of other property of the same general character situated in different places, and Judge Bradley, speaking for the court, said: 'It may be that such evidence would have furnished some guide for estimate of the value of the property, but might not. Such evidence would present collateral issues, which might, and very likely would, involve a variety of considerations having relation to similarity or difference, and to advantages and disadvantages of the different properties in numerous respects, as compared with that in question. It is quite well settled that evidence of that character is not admissible upon the question of the value of property in controversy.' The question was not necessarily before the court in *Mayor, etc., v. McCarthy*, 102 N. Y. 630-638, 8 N. E. Rep. 85; but Chief Justice Ruger, referring to the question whether the price paid on sales of real estate between individuals is admissible as evidence of value, said: 'We think it quite clear, however, that such price is not, in any view, competent evidence of value.' In *Blanchard v. Steam-Boat Co.*, 59 N. Y. 292, the defendant attempted to show the value of a sunken steam-boat by proving the value of other steam-boats with which she could be compared, and it was held that the evidence was not competent. In *Langdon v. City of New York*, (Sup. Ct.) 13

N. Y. Supp. 864, the objection was that other evidence should be produced to establish the fact sought to be proven (page 866) so that the question of the relevancy of the evidence was not before the court. We are of the opinion that the value of property which depends upon the presence or absence of inherent qualities not necessarily present or absent in other and similar property cannot be proved by showing the price paid for such other and similar property. The value of property having a recognized market value, such as No. 1 wheat and corn, may, of course, be proven by showing the market prices; but the value of property which is dependent upon locality, adaptability for a particular use, as well as the use made of property immediately adjoining, may not be shown by evidence of the price paid for similar property. Even under the Massachusetts rule, a reversal would not be justified because of the extent of the discretion vested in the judge or officer presiding at the trial to determine whether such evidence is admissible, depending, of course, on various elements, such as the nearness or remoteness of the time of sale; whether the premises are far separated; the condition of the property about the parcel sold, and the use made of it, which may have operated to enhance or diminish its selling value; the similarity of the property not only as to description, but as to its availability for use. *Chandler v. Jamaica Pond Aqueduct Corp.*, 122 Mass. 305; *Gardner v. Brookline*, 127 Mass. 358-363, and cases cited."

MR. HOUSE, BY WHOM THIS TESTIMONY WAS PRODUCED,
WAS AN EXPERT ACCOUNTANT, AND WAS NOT AN
EXPERT IN OR COMPETENT TO TESTIFY AS TO THE
MARKET VALUE OF ZINC.

It will be borne in mind that Mr. House was not an expert in the matter of sales of zinc. They had experts present in the person of Mr. Nagus and other dealers in zinc. They simply sought to establish values by the introduction of sales sheets of sales to other customers. No case has been found which recognizes the admissibility of any such testimony. Indeed, it was incumbent upon the Government to show that the conditions of these sales were similar to the conditions surrounding the sales of zinc to the Government at the time in question,—size of zinc, quality of zinc, freight rates, conditions of the market, supply and demand, and many other proper elements of consideration. This question also arose in *Schradsky v. Stimson*, 76 Fed. 730. In this case Circuit Judge Thayer of the Circuit Court of Appeals, said:

“Touching this latter ruling it is only necessary to say that the opinion expressed by the witness concerning the reasonable rental value of the premises occupied by the defendant was based on the fact that they were located in a sightly building, at the junction of two streets (Fifteenth and Larimer), on both of which streets there were street-car lines; also, on the further facts that the building fronted on both streets, and was provided with steam heat, and was for these reasons a very eligible business location. No evidence was elicited from the witness, or attempted to be elicited, that the rent that had been charged for stores Nos. 1445, 1449 and 1451, on Larimer street, was a reasonable rental, or that the building in which the stores were located, and the surroundings thereof, were of such char-

acter as to render it probable that the rent charged and collected for such stores was a fair criterion by which to determine the reasonable rental value of the premises in controversy. It is a well known fact that many circumstances may, and often do, affect the rental value of buildings located in large cities, and that it frequently happens that premises of the same size command a different rental, although they are located in the same neighborhood and front on the same street. We think, therefore, that the testimony sought to be elicited from this witness by the aforesaid question was properly excluded. It has no necessary tendency to establish the reasonable rental value of the premises in controversy, and might have been very misleading, unless further evidence was produced, which was not offered, showing that the situation of the respective properties was such that the rent paid for one was a fair rental for the other. Moreover, the testimony was objectionable on the further ground that it had a marked tendency to burden the case with collateral issues; for, beyond all question, if it had been admitted, the plaintiff would have been entitled to show what was the reasonable rental value of the property referred to by the witness, between which and the property in controversy it was proposed to institute a comparison."

Unquestionably, an expert might testify as to the market value of goods at a given time, and then on cross-examination questions of other sales of similar articles at periods not too remote could be inquired into, but in no instance has the rule been extended. In *Chaffee v. United States*, 85 U. S. 21 L. Ed. 912, the Court said:

“All the certificates were admitted without distinction. When the books were offered, objection was taken to their introduction, on the general ground that they were hearsay evidence and transactions between third parties. Subsequently, a similar objection was taken to each of the certificates, on a motion to exclude them from the jury.

“The books were not public records; they stood on the same footing with the books of the trader or merchant. The fact that the lease was from the State did not change the character of the entries made by the collectors, who were simply agents of the lessees, and not public officers of the State. Their admissibility must, therefore, be determined by the rule which governs the admissibility of entries made by private parties in the ordinary course of their business.

“And that rule, with some exceptions, not including the present case, requires, for the admissibility of the entries, not merely that they shall be contemporaneous with the facts to which they relate, but shall be made by parties having personal knowledge of the facts, and be corroborated by their testimony, if living and accessible, or by proof of their handwriting, if dead or insane, or beyond the reason of the process of commission of the court. The testimony of living witnesses, personally cognizant of the facts of which they speak, given under the sanction of an oath, in

open court, where they may be subjected to cross-examination, affords the greatest security for truth. Their declarations, verbal or written, must, however, sometimes be admitted when they themselves cannot be called, in order to prevent a failure of justice. The admissibility of the declarations is in such cases limited by the necessity upon which it is founded.

"We do not deem it important to cite at length authorities for the rule and its limitation as we state it. They will be found in the approved treatises on evidence, and in the numerous cases cited by counsel on the argument. In this court, the case of *Nicholls v. Webb*, reported in 8 Wheat., 326, and that of *Ins. Co. v. Weide*, reported in 9 Wall., 677 (76 U. S. XIX, 810), are illustrations of the rule. In the first case, it was held that, after the death of a notary, his record of protests was admissible upon proof of his death and handwriting, the court observing that it was the best evidence the nature of the case admitted of, that the party being dead, his personal examination could not, of course, be had, and that the question was whether there should be a total failure of justice, or secondary evidence should be admitted to prove the facts. In the second case, the books and ledger of the plaintiffs were admitted in evidence to show the amount and value of goods lost by the burning of their store, upon the testimony of the parties who made the entries that they were correct, the court holding that the books 'would not have been evidence per se, but with the testimony accompanying them, all objections were removed,' and referring to cases decided in the Supreme Court and Court of Appeals of New York in support of the ruling. In both of these cases the entries were made by parties personally cognizant of the facts. This knowledge of the party making the entry is essential to its admissibility. His testimony if living, would be rejected if ignorant of the facts entered,

and it would be strange if his death could improve its value in that respect.

“The cases of Fennerstein’s Champagne (70 U. S. 145, XVIII, 121), and Cliquot’s Champagne, reported in 3 Wall. (70 U. S., 114, XVIII, 116), do not infringe upon this rule. Those were cases where it became necessary to establish the market value of certain wines in France and such value could only be ascertained by sales made by dealers in those wines in different parts of the country, and the prices at which they were offered for sale, and circumstances affecting the demand for them. It would not be proved by a single transaction, for that may have been exceptional; the sale may have been made above the market price, or at a sacrifice below it. Market value is a matter of opinion which may require for its formation the consideration of a great variety of facts. To arrive at a just conclusion prices—current, sales, shipments, letters from dealers and manufacturers, may properly receive consideration. A party, without having been previously engaged in any mercantile transaction, may be able to give with great accuracy the market value of an article the dealing in which he has watched, and in stating the grounds of his opinion as a witness, he may very properly refer to all these circumstances, and even the verbal declarations of dealers. *Alfonso v. U. S.*, 2 Story, 426. Now, in the cases in 3d Wallace, statements of dealers in the champagne, or of agents of dealers, made in the course of their duties as agents, and letters from dealers, and prices-current, were admitted as bearing upon the point sought to be established—the market value of the wines. There is no analogy between these cases and the one at bar. What was the market value of the wines in France was, as already said, a matter of opinion. Whether the defendants had in their possession or custody, between certain dates, 200,000 gallons of

distilled spirits, or any other quantity, for the purpose of selling the same with a design to avoid the payment of duties thereon, was a question of fact, and not of opinion.

"If now we apply the rule which we have mentioned to the certificate books of the canal collectors, their inadmissibility is evident. They were not competent evidence as declarations of the collectors, for the collectors had no personal knowledge of the matters stated; they derived all their information either from the bills of lading or verbal statements of the captains. Nor were the books competent evidence as declarations of the captains, because it does not appear that the bills of lading were prepared by them, or that they had personal knowledge of their correctness, or that their verbal statements, when the bills of lading were not produced, were founded upon personal knowledge; and besides, many of the certificates were admitted without calling the captains who signed them, and without proof of their death or inaccessibility."

It will be borne in mind that we were not concerned with the market value of zinc in September of the preceding year. That question was not before the court. We were simply dealing with the market value, if at all, of these precise goods in April, 1908, when sold to the Government. And to establish market value by seizing one's books and reading entries therefrom of sales to other customers, is absolutely unpredicated. It is certainly something not heard of in the annals of American jurisdiction. At the very most, these entries proved the values of the goods when they were sold; they did not prove the value of the particular zinc sold

to the Government at a later date. And this rule peculiarly applies to the case at bar, in view of the testimony of Mr. Nagus, a Government witness. The reason for this rule is very clearly stated by Justice Blatchford, in *U. S. v. Sixteen Cases of Silk Ribbons*, Federal Case No. 16,301, 27 Fed. Cases, 1102:

“It is quite apparent, in this case, that the cost of the raw silk used in making these ribbons enters into the expense of making them to the extent of from seventy to eighty per cent. of the entire cost of manufacturing them; and, of course, the variation in the cost of making them must depend a great deal on the price of raw silk. It is also in evidence, both by Viollier and by the depositions on the part of the claimants, that there was a time, during the year 1866, when, in consequence of the apprehension of war, and of the existence of war between Austria and Prussia, there was an interruption of trade, the demand for ribbons lessened, and there was a fall in the price of raw silk; and that, after the war closed, raw silk advanced in price. As to when these things happened, I shall speak hereafter. I refer to the subject now, for the purpose of saying, that, if the claimants in this case purchased raw silk at low prices, and manufactured ribbons out of that silk, but did not have them completed and ready for the market until raw silk had advanced considerably, and if they afterwards made out their invoices of such ribbons on the basis of the cost of raw silk bought at those low prices, it is manifest that the cost of the goods so arrived at would not represent their actual market value at the time when they became a completed manufacture, which is what the law of the United States requires. It would undoubtedly represent the cost of the goods

to the manufacturer, because he procured his raw silk at a low price, and he had, or was entitled to, a market for his manufactured goods afterwards, at a price for those goods based upon an increased price of raw silk—a price to the benefit of which, as against him, the United States were entitled. This case furnishes an illustration of why the United States can never admit that a manufacturer shall invoice his goods at their cost to him, with a profit added, unless such cost, with the profit added, is in fact the actual market value of the goods when their manufacture is completed. He cannot invoice them at the price he paid for the raw silk which he put into the particular goods, with the other expenses of manufacture, and a profit added, unless the result is in fact the actual market value of the goods. If any such principle of valuation were to be admitted by the United States as cost with the profit added, the cost which, in reference to raw silk, the United States would have a right to insist upon in a case like the present would be a cost based upon a price for raw silk at the advanced rate at which it stood when the goods were completely manufactured ready for market; otherwise the United States would be defrauded of that to which they are entitled by law. Therefore it is that no individual has any right whatever under any circumstances to substitute in his invoice for the actual market value cost, with a manufacturer's profit added."

WHEREFORE, plaintiffs in error, because of prejudicial error appearing in the record, ask that the judgment be reversed.

Respectfully submitted,

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A. R. BLACK.

Attorneys for Plaintiffs in Error.

IN THE

United States Circuit Court

of Appeals

For the Ninth Circuit

EDWIN F. MEYER and EMAR
GOLDBERG,

Plaintiffs in Error,

vs.

THE UNITED STATES OF
AMERICA,

Defendant in Error.

No. 2413

Brief of Defendant in Error

CLAY ALLEN,
United States Attorney.

WINTER S. MARTIN,
Assistant United States Attorney.

OCT 23 1914

F. D. Monahan,



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STATEMENT OF THE CASE.

The "Navy Yard Cases", insofar as this appellate court is concerned with them at this time, will be briefly summarized for the court:

The Puget Sound Navy Yard is located at Bremerton on the west side of Puget Sound and at a distance of approximately twelve miles from the city of Seattle, both cities being situated in the state of Washington. The Puget Sound Navy Yard is a national naval base, rapidly growing in importance, and as such has demanded and for the purpose of the government is supplied with numerous warehouses which are grouped under the control of a Navy Paymaster, who is ordinarily known and termed "Storekeeper" of the Yard. The warehouses thus under the general direction and control of the Storekeeper contain all the varied and numerous assortment of materials and supplies necessary both for the repair of ships and the replenishing of the stores used by the sailors of the navy. Prior to the visit of the Atlantic fleet to the Pacific coast (an occurrence of the spring and summer of 1908), the Storehouse at the Navy Yard was of considerable less importance than it became immediately prior to that visit and has since remained. The Atlantic fleet left the Atlantic coast just prior to the first of the year 1908, and the first of the fleet to anchor in the waters of Puget Sound reached Bremerton in the latter part of May of the

same year. With the purpose of anticipating the visit of this important squadron, Paymaster Ray Spear was detailed from his post of duty then at Mare Island Navy Yard, California, in the early part of January, 1908, to duty at the Puget Sound Navy Yard, and assumed charge of the Storehouse at that station. Paymaster Spear there found in the office of the Paymaster the plaintiff in error, Edwin F. Meyer, who was carried upon the pay-rolls of the office as principal clerk, and who was at the same time performing the duties of chief clerk. Subordinate to Meyer and subject to his orders was a clerical staff, fourteen to twenty in number, as the same might vary from time to time. It was one of the chief requirements of the duty then confronting Paymaster Spear to immediately assemble a considerable quantity of stores to meet the requirements of the usual demands of the Navy Yard and anticipate in all reasonable measure the unusual demands which would be occasioned by reason of the visit of the Atlantic battleship squadron.

It is necessary for the court to know that the situation confronting Paymaster Spear and his sub-

ordinates was not an easy one, and carried with it a responsibility which should not be underestimated or unappreciated. The stores under his direction and control were at that time, and have since remained, considerably in excess of \$1,000,000.00 in value. In this great Storehouse were included no less than thirty thousand separate and distinct classes of articles housed in five or six warehouses of considerable size. In charge of each warehouse was a "Stockman", whose duty it was to accept or deliver upon proper requisition or demand the various stores committed to his care. For each article in any warehouse a stock-card was kept which would show at a glance the actual balance of that commodity or article then on hand in the Storehouse, this card following from day to day and week to week the rise and fall of the quantity of that particular article or commodity. In the office of the Storekeeper nearby and adjacent to the desk of Meyer, as principal clerk, were the stock ledgers, showing the general account of all commodities and supplies kept in the Storehouse. These ledgers would show at a glance to any one familiar with them the receipt or disbursement of any commodity or supply received or distributed through or under

the direction of the Storekeeper. For example: By turning to the ledger under proper classification under the head of "Zinc Plates 6x12" there would be shown, by proper examination, the recent receipt of supplies of that particular commodity, as well as drafts against it. In other words, in the office of the Storekeeper was maintained a ledger system which would show at a glance to any one familiar with its contents the recent receipts of material or supplies kept on hand. From this great quantity of material and supplies it was the custom to distribute, upon proper requisition, to the different bureaus in the yard, as well as to the ships calling at the station. The method of replenishment of the stock on hand, as disclosed by the record, followed this general working plan. If any bureau in the yard required the use of any metal or similar material, it was quite generally the custom to telephone plaintiff in error, Meyer, at the Storekeeper's office, or send by messenger to the Storehouse in which the particular metal was housed. If this metal was not on hand it was quite generally the custom for the bureau requiring the metal, or commodity, to make oral request for this material, and thereafter a request would be prepared by or under the direction

of Meyer, the principal clerk, for the material or commodity needed. The Storekeeper and his assistants in the purchase of supplies were obligated to follow strict requirements of certain federal statutes, as well as the requirements of the Navy Department, which had the same force and effect. A requirement of the statute in force at the time was to the effect that in the purchase of supplies, the estimated value of which was in excess of the sum of \$500.00, the purchase should be by advertisement in a form and manner prescribed. In the event, however, that the material was immediately required, the statute and regulations permitted, upon the order of the Secretary of the Navy alone, the bids to be waived and the purchase to be made in the open market. In the event the purchase was in excess of \$500.00, the requisitions above referred to were prepared in the following manner: An original and five copies were prepared, of which number the original ultimately found its way to the Paymaster General of the Navy, two were retained in the office of the Storekeeper, one was sent to the Navy Pay Office in the city of Seattle, and the others transmitted to the several bureaus and departments. The Navy Pay Office, as it is com-

monly referred to in the record, was located during this period of time in the Walker Building in the city of Seattle, and it was the province and function of the Navy Pay Office in the city of Seattle to provide for the payment of the public bill and expense so incurred by the issuance of a check or checks to the persons named in the public bill. For the purpose of payment, the government had provided the naval officer in charge of the Navy Pay Office at the city of Seattle with a certain fund which he had deposited to his account as a Paymaster of the United States Navy in the National Bank of Commerce in the city of Seattle. The record discloses that the Paymaster in charge of the Navy Pay Office at the city of Seattle during the time referred to in the indictment was R. H. Orr, and there was employed in the office as clerk J. A. Kettlewell, with one or two other employes whose names are not material so far as the record discloses. The record discloses that the Kettlewell referred to had been for a number of years a civil service employe of the United States, and for a number of years prior to his employment in the office of the Navy Paymaster of the city of Seattle Kettlewell had been employed at the Puget Sound

Navy Yard and there attached to the office of the Storekeeper. While so employed Kettlewell had become closely acquainted with the plaintiff in error, Meyer, and this personal and business friendship continued until long after the period of time referred to in the indictment. It was the business of the Navy Pay Office in the city of Seattle, upon receipt of proper requisition from the Storekeeper's office at the Puget Sound Navy Yard, to provide by advertisement, whenever required, for giving proper notice of the purchase by the government of the material needed. Under ordinary circumstances and in the absence of a waiver of the public notice, proper advertisement was made by posting and publication in such periodicals as would comply with the requirements of the regulations. In event, of course, of requisition in excess of the sum of five hundred dollars, publication was necessary excepting in those cases in which publication was waived by direct order of the Secretary of the Navy. After the issuance of proposals and the award, payment was made for various purchases by disbursement through the National Bank of Commerce in the city of Seattle.

HISTORY OF REQUISITION NO. 438.

The history of Requisition No. 438 insofar as is material in this review is as follows:

In the month of December, 1907, Kettlewell, the principal clerk in the Navy Pay Office at Seattle, observed that the Great Western Smelting & Refining Company and its manager, Emar Goldberg, were obtaining some very profitable contracts through the Puget Sound Navy Yard. The record in the case shows, even prior to this time, numerous occasions upon which Goldberg was the successful bidder against others offering the same commodity at a less price. Since Kettlewell knew Meyer intimately and had at least a close acquaintance with Goldberg, he conceived the idea that since Goldberg seemed to be profiting by more than friendly consideration at the hands of some one in the Storekeeper's office, that he, Kettlewell, should be permitted to participate in the matter. Kettlewell took the matter up with Goldberg, and out of this conversation grew a promise that he, Kettlewell, would be taken care of. Thereafter several contracts came through the hands of Kettlewell, which seemed to the advantage of Goldberg, and Kettlewell pro-

fessed to believe that Goldberg had not kept faith with him, so, during the month of January, 1908, a requisition for 4,000 pounds of zinc 6x12 came through Kettlewell's hands and was awarded to Goldberg at what was undoubtedly a most profitable and extravagant price. Goldberg on this occasion, as seems to have been his custom, furnished, on this requisition for 4,000 pounds of zinc, an excess of nearly 50 per cent. This placed Kettlewell in a position to complain of the excess delivery as well as the excess in price. Kettlewell wrote, or dictated, a letter, signed of course by his superior, to the Storekeeper's office at the Navy Yard, complaining of this particular requisition. This written complaint brought down from the defendant Meyer a bitter oral criticism that Kettlewell had made his action a matter of record, and the history of this requisition in itself is a most striking corroboration of the entire statement of Kettlewell. When the criticism of Kettlewell reached the Navy Yard, it went to the Commandant, and was by the Commandant referred to the Storekeeper for investigation and report. The history of this communication shows, by the statement of Paymaster Spear and that of Meyer himself, that it was never

returned through naval channels as the ordinary course of procedure of naval affairs would require. Thereafter, incidentally, an excess requisition for the amount in excess of 4,000 pounds of zinc was prepared by the defendant Meyer and regularly put through for delivery. As Kettlewell had temporarily "blocked" the convenient arrangement existing between Meyer and Goldberg, it became necessary for Goldberg to free the Seattle office and Kettlewell from dangerous interference. It is Kettlewell's statement that during the latter part of January, after this requisition had been held up, as heretofore described, Goldberg came to the Navy Pay Office in Seattle and called Kettlewell into the hall. As a result of a short conversation Goldberg then handed Kettlewell the sum of \$100 and suggested that "this would settle all former matters," and that thereafter Kettlewell would be entitled to participate to the extent of 20 per cent in the profits of any bid awarded as a result of the combination between Meyer, Kettlewell and Goldberg. Goldberg also explained at this time that Meyer would likewise receive 20 per cent of the profits. It was also stated at this time that at some time later Meyer was to put through a big requisition for zinc and

that Kettlewell was to be on the lookout for this. In connection with this statement of Kettlewell's as to the reason for this payment, the attention of the court is called to Goldberg's own explanation of the singular financial arrangements existing between Kettlewell and himself.

FINANCIAL RELATIONS BETWEEN GOLDBERG AND KETTLEWELL.

Beginning at page 778, Volume 3, of the transcript is a long explanation from the lips of Goldberg concerning his recollection of the financial relations existing between Kettlewell and himself.

“Q. * * * You loaned him \$75 about the 1st of February?

A. Yes, sir.

Q. When did you loan him the next \$75?

A. Probably about a week or ten days later.

Q. A week or ten days later he borrowed \$75 more?

A. Yes.”

All of these pages are interesting on the same point.

About February 1, 1908, the government authorities at Washington set about procuring for the Storekeeper at the Puget Sound Navy Yard a sup-

ply of 6x12x1½ inch zinc plate. The zinc plate referred to is commonly used at or about the heavy metal fastenings which support and attach the rudders and screws of battleships, as well as within the boilers for the purpose of counteracting the chemical action of sea water.

During the month of February, referred to, by purchase from and out of the office of the Secretary of the Navy at Washington a full car of 50,000 pounds of zinc of this particular size was purchased from Matthison & Hegler Zinc Co., located at La Salle, in the State of Illinois. This consignment of zinc was purchased by the government at the price of \$7.13 a hundred, or seven and thirteen-hundredths cents per pound. This consignment arrived at the Puget Sound Navy Yard the 11th day of March, 1908. The bill of lading and other naval routine papers relative to this consignment passed across the desk of the plaintiff in error, Meyer, and bore upon their face his own initials and handwriting. Proper entry was made by some clerk in the office in the large ledger nearby the plaintiff in error, Meyer, showing receipt of this car of zinc and the price at which it was purchased.

On April 1, 1908, or approximately three weeks after the receipt of the full car of zinc, weighing 50,000 pounds, first referred to, the supply of which was undiminished, a requisition was prepared by the plaintiff in error, Meyer, for a full car of zinc, to-wit, 50,000 pounds of exactly the same dimensions, to-wit, 6x12x1½ inch. The record discloses that at the time this requisition was prepared and forwarded there had been no request from the warehouse man, Lockwood by name, for additional supplies, and at the time of the preparation of the requisition no requests had been received at the Puget Sound Navy Yard to supply the ships of the Atlantic battleship squadron. In this connection it should be noted by the court that the usual and customary supply of 6x12x1½ inch zinc, as fixed by the stock card in the warehouse, was 8,000 pounds, and that the warehouse of the government at the Navy Yard already was abundantly supplied. The plaintiff in error, Meyer, after the preparation of a requisition for 50,000 pounds of zinc, and with the ledger revealing that the last former purchase by the government within a period of three weeks showing a purchase price of \$7.13 per hundred, fixed a cost price upon his requisition of \$12.50 a

hundred. To insure its purchase through the Seattle office, where the requisition could have the kindly attention of his friend Kettlewell, Meyer writes in his own handwriting across the original requisition a request that advertisement be waived, conforming in this particular to the requirement of the statutes and regulations that the purchase of any material in excess of \$500, without advertisement, could only be done upon the direct order of the Secretary of the Navy.

It will be borne in mind by the court that requisitions for supplies were numerous and the duties of Paymaster Spear, an exceptionally conscientious officer, were burdensome in the extreme. It was the custom in the office, after Paymaster Spear's arrival, that any matter to which his personal attention should be called should bear a white tag or slip in order that his attention might be attracted to the matter. While this particular requisition for 50,000 pounds of zinc was in itself the heaviest requisition going through the Paymaster's office during all of this strenuous period, with possibly the exception of one and that was for beef, the matter was never especially or particularly called

to the attention of Paymaster Spear, who signed the requisition. When the requisition was originally prepared, the quantity was given as 50,000 pounds, at the estimated price of $12\frac{1}{2}c$ a pound, while the total sum extended on the right was given as \$650, and a rapid computation will show that by an extension of the proper amount it should have read \$6,500. It was the custom in this office to lay down before the Paymaster the original requisition on top of the several copies. The original, which was consigned to the Paymaster General, was not expected to have extended on its face the amount of the estimated cost. It is apparent from an examination of the photographic copy of the original requisition and the various copies offered that when this was presented to Paymaster Spear and he rapidly turned back the original to glance at the copy beneath that he would have found a proposed purchase of 50,000 pounds at an estimated cost of \$650. It would have been very easy under the circumstances for the principal clerk to then explain that it should read 5,000 pounds and that the estimated price of \$650 was correct, or, in the event the matter passed the scrutiny of the Paymaster, that another cipher should be added to the amount, causing it to read

\$6,500. At any rate, at some time subsequent to its original preparation another cipher was added to the \$650 causing it to read \$6,500, and this is the face value of the estimate as it now appears. The request of Meyer, through the Paymaster, was confirmed to by the Secretary of the Navy and in due course of time the Navy Pay Office at Seattle was by telegram directed to make the purchase requested. After discussing the matter with Goldberg, Kettlewell then prepared a number of proposals which were thereafter distributed to such persons and companies as would result in the least harm to the arrangement between Meyer, Goldberg and Kettlewell. An examination of the record will disclose that of all eight of the proposals personally distributed or received in connection with this proposed purchase, each and all of them was conclusively explained to the jury as offering no real competition in the proposed purchase. In the requisition as prepared by Meyer, the time of delivery for the commodity was fixed at fifteen days. After conference with Goldberg this was changed by Kettlewell to read five days, and this is the time when, according to the statement of Goldberg, there was not a car of zinc of this par-

ticular size on this entire Pacific coast. Some of those persons to whom proposals were taken are substantial and reputable concerns of the city of Seattle, but these, it will be noticed, bear upon their face, the suggestion that they are unable to furnish the commodity. No one of the eight several bids submitted on this occasion was a genuine competitive bid, free from criticism as to its origin and lack of good faith. On the day of the proposals, April 11, 1908, Goldberg telegraphed to Mattheson Hegler Zinc Co. at Lasalle, Illinois, for the car of zinc, showing a supreme confidence in his knowledge of the zinc market in Bremerton and Seattle. In the examination of these proposals it should be borne in mind that under the testimony of Goldberg each and all of the bids submitted to the Puget Sound Navy Yard by either W. A. Corder, one of the defendants herein, and also one of the bidders, or the Great Western Smelting & Refining Company, was a community or partnership bid between Corder and the other concern. (Goldberg pp. 794-795-8 Transcript.) The record discloses, however, according to the statement of Goldberg, that he was irritated at his friendly competitor at this time and he desired to "put one over" on Corder, as the

expression is quoted from the witness Silverstone.

BID BY SILVERSTONE.

Goldberg then went to the defendant Silverstone a few days prior to the award and told Silverstone that he wished Silverstone to put in a bid in the name of the Fowler Metal Company. Silverstone demurred somewhat at first, but upon Goldberg's assurance that he could procure the written authority from the Fowler Metal Company for him, Silverstone was persuaded to act, and signed a proposal in the name of that company. The agreement between Corder and Goldberg, according to Goldberg, was that Corder should submit a bid of \$12.60 a hundred, and the Great Western Smelting & Refining Company should at the same time submit a bid of \$12.50 a hundred. At the suggestion of Goldberg, Silverstone submitted a bid in the name of the Fowler Metal Company of \$12.45 a hundred. On the day of the award Corder was present in the office when the award was made to Silverstone, and the Fowler Metal Company, and made a remark to Kettlewell to the effect that "Silverstone was a friend of Jimmie's" (meaning Goldberg), and intimating that his own trust and confidence had been

betrayed. Both Silverstone and Goldberg substantially agree as to what happened thereafter. Silverstone was on the next day after the award called down to a conference with Goldberg, in which a mysterious explanation was made to him that this competitor had been threatening trouble, and suggesting to Silverstone a fanciful remark, afterwards made by Silverstone to Corder, intimating that he (Silverstone) had heard Corder talking over the telephone. Peace was again restored to the allies, and the award was made to the Fowler Metal Company at \$12.45 per hundred. Although the award was made on April 15, 1908, and required a delivery in five days, it was not in fact delivered at the Navy Yard until the 9th day of May, following. *The car actually delivered was the car ordered by and delivered to the Great Western, but the successful bidder was the Fowler Metal Company.* When the consignment of 50,000 pounds arrived from Illinois, Goldberg, serene in his confidence as to the generosity of his friend Meyer, added to this consignment something over 9,000 pounds of plate of the same size. This was accepted by the Navy Yard, although it was an uncontradicted fact in the record that 10% or more in excess of the amount of a commodity

requisitioned for was considered by government authorities as an "excessive delivery", and a habit of excessive deliveries would result at a normal yard in a rejection of all bids from the offender.

HISTORY OF CHECK.

On May 26, 1908, or something over a month afterward, Paymaster Orr prepared a check, drawn on the National Bank of Commerce at the city of Seattle in the sum of \$7,417.09 payable to the order of the Fowler Metal Company for the amount of the public bill for the zinc hereinbefore referred to. The record is not clear as to the time of the delivery of this check or the person to whom it was delivered. Silverstone was of the opinion that he personally obtained the check (Tr. p. 454).

"Q. Did you personally get the check or did Mr. Goldberg get it?

A. My best recollection is that I got it."

The time of the receipt of the check is likewise a disputed point in the record. Silverstone was of the opinion apparently that it was received on June 1st, while Kettlewell was under the impression that it was delivered to some one at the date indicated

on its face, May 26, 1908. The statement of Silverstone is found at page 454 as follows:

“Q. * * * What did you do with the check when you got it?

A. I took it down to Mr. Goldberg, who was waiting for me at, I think, the Butler Hotel; in fact, I am sure it was the Butler Hotel; and I handed him the check.”

Then follows a lengthy description of the arrangement made between them and of the fact that Silverstone made a trip to the bank while Goldberg waited to learn the result. Silverstone fixes this date at June 1, 1908, (Tr. pp. 456-457).

“Q. The banker’s slip shows you had two checks that you deposited there, one for a small amount and the other for this amount, and that was crossed off, that would be of the date—approximately what was the day when you first went into the bank?

A. I think June 1st.

Q. June 1st, 1908?

On this date, at the suggestion of Goldberg, Silverstone attempted to exchange checks with Goldberg and for that purpose took the Navy Pay check to Silverstone’s own bank and attempted to deposit it to his (Silverstone’s) account. The bank teller at

the window on this occasion notified Silverstone that the endorsement of the Fowler Metal Company would not be accepted by the government officials unless the name of some officer was subscribed with the name of the company. Silverstone was reluctant to sign the name of the Fowler Metal Company and he went back to where Goldberg was waiting for him and Goldberg then endorsed the name of E. S. Fowler as manager, with some designation which is not clearly decipherable, on the check. After the check was successfully deposited Silverstone gave to Goldberg Silverstone's check in the same amount, \$7,417.09, and this check was in due course, to-wit, June 2, 1908, deposited by Goldberg in Goldberg's own bank to his own personal account.

On the same day, June 2nd, as shown by the other checks offered in evidence, a settlement was effected between Goldberg and his co-conspirator, Corder, and the settlement so arrived at, which includes the other items, as well as this particular requisition 438, leaves in Goldberg's hands an unexplained balance of \$631.00. This balance of \$631.00 is exactly identical with the profit made

in requisition 438, and corresponds and corroborates perfectly the testimony of Kettlewell that he was to receive 20% of the profit in the transaction.

PAYMENT FOR ZINC.

The record discloses with reference to this matter of payment for the requisition 438 that the check of Paymaster Orr, after deposit to the account of Silverstone, passed through the Seattle clearing house and was on June 2, 1908, charged against the funds of the United States then standing to the credit of Paymaster Orr.

Testimony of E. K. Riley, Auditor of Seattle National Bank (Tr. p. 513):

“Q. I will ask you whether or not, from the records and books of that bank, that check was, in due course of business, cashed and charged against the account of Paymaster Orr of the United States Navy, being a part of the government funds of the United States?”

WITNESS: “A check of this amount was paid against Paymaster Orr on account of *June 2, 1908*, and charged against the funds there in his hands as Paymaster.”

WITNESS (Tr. p. 513): “This check had been deposited in the First National Bank and was cleared on the Seattle National Bank on *June 2, 1908*.”

ARGUMENT.

(The italics used in quotation herein are those of the brief writer unless otherwise indicated.)

The defendants were indicted under Section 5440 of the Revised Statutes, the same being the ordinary conspiracy statute, with which the court is familiar. It will be recalled that Section 5440, Volume 2, page 247, Revised Statutes, provides for punishment if two or more persons conspire either "to commit an offense against the United States or to defraud the United States in any manner, or for any purpose." As the court is well advised, this section provides for two distinct classes of offenses, the first covering conspiracies to commit offenses and the second covering conspiracies to defraud the United States.

The indictment in this case at bar charges the defendants (Tr. p. 7, Vol. 1) with "*knowingly to defraud the United States of divers large sums of money by means of a certain fraudulent scheme, devised by the said Edwin F. Meyer, J. A. Kettlewell, W. A. Corder, Emar Goldberg and E. Silverstone, and which was then and there in process of execution by them.*"

This section further provides that the conspiracy (Tr. p. 8) “was continuously in process of execution in said western district of Washington
* * * *from the 1st day of April, 1908, to and including the 2nd day of June 1908, and was then and thereafter in process of execution by and between the said Edwin F. Meyer (et al.)*”

(Tr. p. 13): “It was the further object and purpose of said unlawful conspiracy, that the United States should pay for said zinc, rolled sheet, boiler plate a price greatly in excess of its real value, and *that said conspirators should obtain for themselves an exorbitant and unreasonable profit.*”

And at line 17 on page 13 of the Transcript: That they “*should appropriate and convert to their own use such unreasonable profits so fraudulently to be realized.*”

It will be noted that the object of this conspiracy was to *defraud the government of the United States of large sums of money*. It will also be noted in this connection that the indictment set forth the scheme or plan by which this object was to be consummated. This scheme or plan involved the use of a number of written instruments to effect that purpose. While the indictment does not name

them, it included the use of, (a) an original and five copies of the requisition, (b) order from the Secretary of the Navy directing the waiver of advertisement, (c) the issuance of written proposals, (d) the award and notice of award to the successful bidder, (e) the preparation and issuance of a public bill, and (f) the preparation and issuing by the Paymaster of a check payable to the successful bidder.

All of these steps were necessary to and preceded the accomplishment of the purpose and object of the conspiracy, and that was to obtain public money of the United States. Each and all of these several steps was an essential requirement to the consummation of this fraud, and no one of them can be said to arise superior to the other as a necessary step to be done by these conspirators.

There is no intimation or suggestion at any time or place in the record, and there never was in the trial of the case, that these defendants were charged with attempting to procure a government check, nor were they ever charged with attempting to procure the original requisition issued by the defendant Meyer. Each and all of these instruments

was an essential instrument to the conspirators in their work, but neither of these instruments in itself was of value to the defendants.

The record discloses, and it should be noted by the court, that the real participation of the defendant Corder in this particular enterprise was *begun subsequent to the award and subsequent to the time when the check was deliverable, and ended after June 2nd*, when the money had been obtained.

It will be noted from the record that the conspirators were still in a dangerous position, even after the delivery of the check to one of their number. The court in an examination of this point is confronted with some confusion in the record:

It was the statement of Goldberg (Tr. p. 808) that he obtained the check from Kettlewell.

“Q. Now, when you received this check for \$7,417.09 from the United States Government from whom did you obtain it?

A. From Mr. Kettlewell.

* * * * *

Q. You testified, I believe, in your direct examination, it was May 26th, 1908, is that right?

A. Yes, sir."

Silverstone's recollection is to the effect that he obtained the check (Tr. p. 454), from Kettlewell.

"Q. Did you personally get the check, or did Mr. Goldberg get it?

A. My best recollection is that I got it."

A photographic copy of the check was then shown to the witness and he was again asked:

"Q. I will call your attention to the endorsements on the back of that check. What did you do with the check when you got it?

A. *I took it down to Mr. Goldberg, who was waiting for me at, I think, the Butler Hotel; in fact, I am sure it was the Butler Hotel; and I handed him the check."*

Then follows on page 455 of the Transcript an account of Silverstone's two trips to the bank; the first time being turned back by the teller because the name "Fowler Metal Company" had not the signature of an officer appended to it. (T. 457.)

"Q. * * * Approximately what was the day when you first went into the bank?

A. I think June 1st.

Q. June 1st, 1908?"

The deposit slips which are exhibits in this case

as well as the testimony of the witness Howell, assistant cashier of the First National Bank, corroborate Silverstone's statement as to the two trips on this same day made by Silverstone to the bank, although Howell's recollection of the matter, after a period of some time, is not clear or definite. (Tr. p. 504.)

“Q. But there was some conversation at that time between yourself and Mr. Silverstone?

A. Yes,. The check was given back to Silverstone by me for some reason, and my impression is it was on account of there was no official endorsement on the back of the item. I can't—

Q. But it was turned back at that time when it was first presented?

A. Yes, that would be very natural.

Q. Was this check afterwards presented for payment, or was it deposited in regular course in your institution?

A. Yes, sir.”

The dates as fixed by Silverstone are confirmed by Howell. He further states that Silverstone's check in an equal sum was on the 2nd day of June, 1908, charged to Silverstone's account on the books of his bank.

With an indictment in this form and with these facts apparent in the record, counsel for the plaintiffs in error have devoted practically all the pages of a voluminous brief to the contention, adroitly phrased and ingeniously insisted, that the delivery of the check by Kettlewell marked the end of the conspiracy; and since this delivery was, *according to Goldberg's statement*, on May 26, 1908, the statute of limitations had run by reason of the fact that the indictment was not presented in the case at bar until May 29, 1911, more than three years after this date.

As that part of the record hereinbefore quoted demonstrates, this entire and lengthy argument of counsel proceeds upon two theories, equally fallacious. For, in the first instance, there was evidence before the jury that the check was actually delivered on June 1, 1908, and therefore three years had not passed. In the second instance, the indictment did not charge the defendants with the offense of attempting to procure a check, but with the offense of defrauding the government of money.

Counsel for plaintiff in error cite for consideration on this point about one hundred cases, all of

which, as we view the matter, have no possible relevancy. They are for the most part cases involving a *single* act of misconduct, itself inhibited as an offense. These have no bearing upon a crime such as conspiracy, consisting, as this does, in a series of acts, none of which may, in themselves be unlawful, but all of which taken together lead to the accomplishment of an unlawful object.

Considering, for the moment, the single act, designated as a crime, there seems little doubt that, if a criminal fraud is perpetrated by one person upon another with the purpose and end of securing a check for money, the courts will permit the institution of a criminal proceeding either for the check itself or for the money which it represents. The numerous cases cited by counsel are those cases which support the criminal courts in the attempt to prosecute crime in those instances where the prosecutions are based upon the check rather than upon the procurement of the money itself. An equal number of cases could be cited, probably greater in number, which support the indictments and informations based upon the money rather than upon the check. In other words, courts have

been disinclined to turn criminals loose upon the quibble as to whether the check itself was the thing of value or the money which could be paid against it. All of these decisions are directed to the same point, and are, as we view it, of absolutely no value to the court in the determination of the appeal in the case at bar. Here the defendants are charged with a conspiracy to obtain something of value. They are charged with conspiring to secure, not a requisition; not a public bill; not a proposal; not a check; but public money of the United States, and this conspiracy, beginning as it did on January 1, 1908, ran its long and stealthy course through a period of months, or even years. The record discloses that after the check was procured the defendants were then in a peculiar predicament, which threatened to thwart the very purpose of the conspiracy, and that was to obtain the money. After the check was obtained some dismay is apparent among the defendants, who had not yet accomplished their object and purpose. This check bears date May 26th, 1909, and it was not deposited by Silverstone until June 1st, 1908, a period of exactly five days. Counsel for the plaintiffs in error would not render themselves ridiculous by

suggesting to the court that this check made payable to the Fowler Metal Company was of any value to these conspirators in that form. They could not divide it into several parts and distribute it among the several members of the conspiracy. The writer yields to no one in his admiration for the lithographic beauty of our governmental pay-checks, but it has never seemed possible that one of these could, like Joseph's coat of many colors, be divided into smaller parts and each part retain any real or proportional value. It is apparent that when the check was delivered and two of the conspirators, Goldberg and Silverstone, were scheming in the Butler cafe and bar over a method and plan to convert this Paymaster's check into money, that the conspiracy was yet alive and active and was actually unaccomplished. With each successive step of this conspiracy there may have come to the conspirators a feeling of exultation at the particular advance of the conspiracy. When the requisition was issued and had successfully passed the Paymaster at the Navy Yard, carrying with it an estimate of \$12.50, a hundred, that was undoubtedly a cause for congratulation for the cause of the conspirators; likewise, when an order was obtained for the purchase of the

zinc, without advertisement, it seemed that the plan or scheme was working admirably; when, however, it had advanced sufficiently far that there was actually delivered into the possession of two of the conspirators a check of the government, made payable to the order of the Fowler Metal Company (with which neither of these men was in any wise connected), it was then that the most daring and desperate part of the conspiracy was really enacted. Silverstone refused to sign the name of the Fowler Metal Company, because he had no authority to do so, and took the check back to his friend Goldberg, waiting in the Butler Hotel. Confronted with this irritating dilemma, Goldberg did not hesitate, but signed the name of the Fowler Metal Company, by E. S. Fowler, President, thereby adding forgery to his long list of offenses.

Those who heard the testimony, and the jury by their verdict, stamped as fraudulent and false the weak and insincere explanation of both Goldberg and Fowler as to the part the Fowler Metal Company played in this transaction. In this connection, it might be asked, and the question was never answered in the trial: If the relations between Gold-

berg and Kettlewell were not intimate and close in the degree sworn to by both Kettlewell and Goldberg, how did it come about that Kettlewell delivered to Goldberg, who was a bidder for this particular zinc, a check which was intended for one of his rivals, the Fowler Metal Company, with an office in San Francisco? Goldberg, himself, insists that he received the check, and this statement of his becomes only the more convincing corroboration of the friendly relations that existed between Kettlewell and Goldberg.

The evidence in the case, conforming to the allegations in the indictment, which provide that "this money should be divided between Edwin Meyer, J. A. Kettlewell, Emar Goldberg, acting for and as the agent and manager of said Great Western Smelting & Refining Company; W. A. Corder, acting for and as the manager of W. A. Corder Company, and E. Silverstone (Tr. p. 13), shows conclusively, insofar as figures can demonstrate any fact, that on and after the 2nd day of June, 1908, these conspirators divided the proceeds of the check paid for the zinc among themselves in accordance with the agreement described by Kettlewell.

PAYMENT.

Payment is defined by Bouvier's Law Dictionary as follows:

"The fulfilment of a promise, or the performance of an agreement.

"The discharge in money of a sum due. It implies the existence of a debt of the party to whom it is owed, and the satisfaction of the debt to that party."

The author further states:

"It is now a law that payment must be made in money, unless the obligation is by the terms of the instrument creating it, to be discharged by other means."

The author further declares:

"Giving a check is not considered as payment; the holder may treat it as a nullity if he derives no benefit from it. Provided, he has not been guilty of negligence so far as to cause injury to the drawer; 2 B. & P. 518; 4 Ad. & E. 952; 4 Johns. 296; 30 N. H. 256; 78 Cal. 15. See 17 R. I. 746; 8 Misc. Rep. 535; 4 Tex. Civ. App. 535; 39 Minn. 340; 101 N. C. 589; 59 Mo. App. 610."

In the case at bar the defendants are charged with conspiring to defraud the United States. The fraud upon the United States is represented not by

the total amount of said check, that is, \$7,417.09, but is represented by the difference between that sum and a reasonable price bid at the time in honorable and open competition. So, it will be seen that when the check was delivered and uncashed it contained legally two dissimilar and different funds: One sum would represent the sum honestly and fairly due for material really furnished, and the other sum would represent that part of which the United States was defrauded. Not until this check was cashed was it possible for the conspirators to segregate and divide among themselves the unlawful loot of their enterprise.

The American & English Encyclopedia of Law. Second Edition, under the head of "Payment," Volume 22, page 569, states the general rule of law with respect to a check as follows:

"It is a well settled and universally recognized rule that when a debtor has given his check for the amount of his indebtedness, the *prima facie* presumption arises that the check was taken merely as conditional, not absolute, payment, and in case the check is not honored upon due presentation the original indebtedness for which it was given continues to exist, and recovery may be had by the creditor without resorting to the debtor's liability on the check."

An entire page is cited by the author in support of that declaration.

In this connection the court's attention is called to the fact that upon the delivery of this zinc an obligation was then due from the United States government, not to Goldberg, nor Kettlewell, nor Corder, nor Silverstone, nor to any other member of this conspiracy, but an obligation was then due from the United States government to the Fowler Metal Company. One of its public servants then prepared a check, signed by himself as paymaster, but directed to a bank in which was deposited public funds of the United States. This check, in the absence of fraud, was then the property of the Fowler Metal Company, and was not the property of Silverstone, Goldberg or any other member of the conspiracy. The United States government, through its recreant agent, Kettlewell (a conspirator), delivered this check, not to the Fowler Metal Company in San Francisco, but delivered it either to Silverstone (a conspirator), as he claims, or to Goldberg (a conspirator), as is claimed by Goldberg, but at no time and never at any time, according to the view at least accepted by the jury, was this check ever delivered to the Fowler Metal Com-

pany, its rightful possessor. In this connection there is further suggested to the court that the evidence in the record is undisputed that the name "Fowler Metal Company" was never endorsed upon the check until June 1, 1908; therefore, if it may be assumed for the moment that Goldberg ever had any lawful authority to sign the name of "Fowler Metal Company" or "E. S. Fowler" as its officer, he never exercised that authority until June 1st, which was within the period of the statute of limitation. In other words, technical possession and ownership of this check from the Fowler Metal Company, even accepting the act of Goldberg, fraudulent though it was, at its full value, never passed from the Fowler Metal Company until its endorsement was actually made on June 1st, 1908.

While counsel for the plaintiffs in error have cited something over one hundred cases in support of the general declaration that this check constituted payment and the end of the conspiracy, the greater part of them have no relevancy and cannot be reviewed in any brief of reasonable length. Reference is had, however, to certain of the cases upon which counsel seems to generally rely.

While the aspect of a check changes with the declaration of various legislatures taking the matter in consideration, counsel goes back to the case of *Marreco vs. Richardson*, 15 Am. & Eng. Ann. Cases, 329, and quotes at length from the opinion of Lord Justice Farwell. The attention of the court is called to the statement of the lord justice, as follows:

“And I should myself prefer to say that the giving of a check for a debt is payment conditional upon the check being met; that is, subject to a condition subsequent.”

This rule of law has since changed, insofar as the decisions of the courts of the United States are concerned, and the rule of law undoubtedly now is that

“A check is not payment unless by express stipulation or distinct agreement of the parties, they so agree.”

Hatcher vs. Coiner, 75 Ga. 728.

Kermeyer vs. Newby, 14 Kan. 164.

Marrett vs. Brackett, 60 Me. 524.

Selby vs. McCullough, 26 Mo. App. 66.

Barton vs. Hunter, 59 Mo. App. 610.

People vs. Baker, 20 Wend. 602.

Where the check is dishonored, the creditor may resort to the original claim:

Camptoir D'Escompte de Paris vs. Dresbach,
75 Cal. 15; 20 Pac. 28.

Purser checking on government funds and payment thereof being stopped does not constitute payment:

Taylor vs. Wilson, 52 Mass. 44; 145 Am. R.
180 (11 Metc.).

Counsel has referred to the case of *Norton vs. United States*, 205 Fed. 593, and quotes at length from the opinion of the court therein. It is difficult to conceive how this case could be deemed of value in support of the contention of the plaintiffs in error. Here the money of the bank issuing the draft was affected from the moment of issue. In the case at bar, the government funds were not affected until a properly subscribed check or draft was presented for payment. It should be borne in mind that the money on which Mr. Orr was drawing was not his own, and his check became nothing more than a draft or sight draft of a government employee upon government funds. The Treasurer of the United States at Washington might or might

not honor this draft, as it seemed to him fit and proper. In this connection, it may be noted that these checks or drafts drawn by the paymaster are not returned to him personally, but are forwarded to the Treasurer of the United States.

Reference is made to the case of *State vs. Briggs*, 7. L. R. A. 278, in which the Supreme Court of Kansas upheld a conviction for a fraud in which the defendant was charged with unlawfully obtaining a check for money, the check afterward being cashed in another county. Prosecution was brought in the county in which the check was issued, and it was held that venue would lie for the fraud. This decision is only in line with the many decisions which support transactions based either upon the check itself or upon the deed, and we have no doubt that a prosecution would have been sustained in that particular case if the action had been brought in the county in which the check was cashed, based upon the procurement of the money itself.

Reference is several times had by plaintiffs in error to the case of *Lonabaugh vs. United States*, 179 Fed. 476. This is a prosecution for conspiracy for obtaining certain public lands of the United

States and all of the acts of the conspiracy were committed more than three years prior to the bringing of the indictment. In that connection, the words of Judge Van Devanter are quoted at page 479:

“But as a preliminary to so doing it should be observed that no act can be so regarded unless it was a positive rather than a passive one; was the act of one or more of the conspirators; and was done to effect the object of the conspiracy.”

Comparison should be made with the opinion of the court as written by Judge Van Devanter, basing his decision upon the fact that all of the acts done by the conspirators were more than three years prior to the presentment of the indictment, with the facts in the case at bar, where the record shows without conflict of testimony that the two conspirators, Goldberg and Silverstone, were conferring together and actually signed the check on the first day of June, 1908, and within three years of the presentment of the indictment.

IT IS THE GENERAL RULE THAT NOT
EVEN A PROMISSORY NOTE WILL OPE-
RATE AS PAYMENT OF PRE-
EXISTING OBLIGATION.

This rule of law is enunciated in several decisions of the Supreme Court of the United States. In the case of *Duncan vs. Kimball*, found in 3 Wall. 37; 18 L. Ed. 50, Mr. Justice Field said:

“By the general commercial law, as well of England as of the United States, a promissory note does not discharge the debt for which it was given, unless such be the express agreement of the parties. * * * The creditor may return the note when dishonored and proceed upon the original debt.”

The words of Chief Justice Marshall were quoted with approval in the case of *Segrist vs. Crabtree*, 33 L. Ed. 126:

“That a note, without a special contract, would not, of itself, discharge the original cause of actions, is not denied.”

Many other cases of equal dignity could be cited in support of the same declaration.

If, then, it is the rule of law that an instrument of the high dignity and character of a promissory note does not in itself constitute payment, with how much greater force does it impress the mind that a mere check, which is but an order for the payment of money, can, under no circumstances, be deemed a payment and discharge of a debt or obligation.

THE STATUS OF A CHECK IN THE STATE OF WASHINGTON.

The check in question was delivered in the City of Seattle, King County, Washington,—assuming for the moment that the action of Kettlewell constituted an actual delivery on the part of the government. This action of the paymaster and that of Kettlewell in delivering the check referred to, would be, under the general rule construed by the rule of law obtaining in the State of Washington.

The attention of the court is called to Section 3575 of Remington & Ballinger's Code of the Statutes of the State of Washington, found in Volume 2, page 150:

“A check is a bill of exchange drawn on the bank, payable on demand. Except as herein otherwise provided, the provisions of this act applicable to a bill of exchange payable on demand apply to a check.”

Section 3519, same page, reads as follows:

“A check of itself does not operate as an assignment of any part of the funds to the credit of the drawer with the bank, and the bank is not liable to the holder unless and until it accepts or certifies the check.”

(Laws of 1899, page 372.)

Section 3517, page 142, of Volume 2, of the same work, reads as follows:

“A bill of itself does not operate as an assignment of the funds in the hands of the drawee available for the payment thereof, and the drawee is not liable on the bill unless and until he accepts the same.”

(Laws of 1899, page 363.)

See

Frederick & Nelson vs. Spokane Grain Co.,
47 Wash. 85.

In the case of *Benham vs. Columbia Canal Co.*, 74 Wash. 110-119, the court declares the rule of law of the State of Washington to be:

“It is the general, if not the universal, rule that payment in anything other than money can only be made upon the distinct agreement of the creditor with the consent of the debtor to accept the thing as payment.”

In the case of *Exchange National Bank vs. Hunt*, 75 Wash. 516, a written guarantee had been given to secure the payment of an open account. Subsequent to the giving of this guarantee a note was given by the debtor and the guarantor was not a party to this instrument. Thereafter a second note was given, taking up the original similar obligation.

The original guarantor having died, it was sought to assert against his estate the obligation of his guaranty, and it was contended on behalf of his estate that the acceptance of the note by the grantor discharged the obligation of the guarantor, for the reason that the note was accepted in payment of the original obligation. The Supreme Court denies this at page 517 and uses the following language:

“The question then is, did the taking of the promissory note for a pre-existing liability, which was covered by the guaranty, constitute a payment of the debt, and thereby release the guarantors? The rule is that the taking of a promissory note for an antecedent liability does not constitute a payment of the debt in the absence of an agreement to that effect, or evidence that such was the intention of the parties.”

Numerous authorities are offered in support of that doctrine.

The attention of the court is called to Section 325, Hufferut on Negotiable Instruments, at page 79, which reads as follows:

“A check of itself does not operate as an assignment of any part of the funds to the credit of the drawer with the bank, and the bank is not liable to the holder, unless and until it accepts or certifies the check.”

THE OBJECT OF THE CONSPIRACY.

This appellate court has recently had presented to it, with great force and earnestness, the appeal in the case of *Houston & Bullock vs. United States*, and the judgment of the lower court has recently been affirmed. While the opinion of the court has been so recently handed down as to not at this time be available for inspection, it is apparent from the record that there was there presented the contention of counsel that the statute of limitation would begin to run from the time of making the award, and learned counsel there insisted that this was the definite act that would toll the statute of limitation. All the force and persuasive logic which is used in the present case was there used to induce the court to believe that the conspiracy had as its object the mere securing of a contract, but it was contended on behalf of the government, as it is here contended, that the purpose and object of the conspiracy was to secure *money*, not to acquire merely a written memorandum. If ingenious counsel for plaintiffs in error were permitted to select some one of the numerous steps which might be found necessary in a long and involved conspiracy, and fix their finger upon that as setting in motion the statute of limita-

tion, it would be easily possible for many offenders of this kind to escape punishment. In the case at bar, this conspiracy which began on or about the first of the year 1908, actually continued for a period long after the first day of June of 1908. This was but one of numerous offenses, and the indictment selected this particular transaction as being one of the many of a general working agreement. There is nothing to be said in favor of May 26th, the time of the issuance of the check, as tolling the statute of limitation, that could not be said with equal force as to the date of making the award, or the date of the issuance of the requisition. Each and all of these were intermediate and necessary steps to the consummation of a purpose which is clear and apparent to any one familiar with the greed for money so overpowering in the breasts of many men.

THE STATUTE OF LIMITATION.

It was formerly contended in conspiracy litigation that the statute of limitations began to run from the time of the formation of the conspiracy. This theory of law has long since been abandoned and it is now the well settled principal of law that the statute of limitations runs from the date of the

last overt act in furtherance of the conspiracy. This court has passed upon the question in the well remembered case of *Jones vs. United States*, 179 Federal 584. In this case, as in the case at bar, some of the overt acts were outside of the statute of limitations, while certain of these acts brought the offense within the prescribed period. In deciding this case Judge Morrow uses this language (p. 610):

“Under this rule the overt acts alleged in the indictment and established by proof continued the conspiracy to the time within the statute of limitations.”

The same principal was prior to that time adopted by Judge De Haven in the case of *United States vs. Brace*, 149 Federal 874. Judge De Haven, at page 877, uses the following language in describing conspiracy:

“The crime consists in putting the corrupt agreement into active operation, and so long as it is in operation the offense is a continuing one. This being so, my conclusion is that, whenever a person commits any act in pursuance of an existing conspiracy, no matter when such conspiracy was formed, or how many precedent acts have been committed for the purpose of effecting its object, the offense defined in Section 5440 of the Revised Statutes is then

committed, and is subject to prosecution. * * * There can be but one prosecution, based upon a single conspiracy, and this is not barred as to any overt act within the statutory period."

In the case of *United States vs. Barber*, 157

Federal 889, where the plea of statute of limitations was again raised, Judge Quarles, in discussing the point says (p. 892):

"If the law is correctly laid down in *Ware vs. United States*, 154 Fed. 578, it is the existence of the conspiracy rather than its formation which is the material fact, and that the conscious participation by the defendant within three years in an existing conspiracy makes it a crime within the purview of Section 5440, without regard to the time when the unlawful combination was in fact formed. This case may be said to be an innovation in the law, but it is a well reasoned and instructive case."

In the case at bar it will be remembered by the court that the record here discloses that at least two defendants, Silverstone and Goldberg, were, on June 1, 1908, and within the statute of limitations, endorsing this check for deposit in Silverstone's bank. The record discloses that after that time plaintiff in error Goldberg was busy in the distribution of the funds so obtained to the various beneficiaries of this corrupt agreement.

The attention of the court is called to the case of *United States vs. Driggs*, 125 Federal 520. This was a criminal proceeding instituted against Driggs for a violation of Section 1781, it being charged that Driggs was, while a congressman, interested in the proceeds of a contract entered into for the sale of certain automatic cashiers to the United States. The company interested executed the following instrument:

“Watertown, Wis., May 25, 1899.

“For value received, we promise to pay George F. Miller or order, twelve thousand five hundred dollars, without interest, on receipt of the proceeds of sale of 250 or more automatic cashiers, sold May 19, 1899, to the United States Post Office Department.”

This instrument was in turn assigned by Miller to the defendant, he assisting in procuring the contract from the government. From time to time at various periods of time subsequent to the date of this instrument, payments were made to Driggs. It was contended on the part of the defendant that the statute of limitations should begin to run from the date of the instrument, while it was there contended on the part of the government that the statute of

limitations ran from the payments of money made pursuant to the terms of the contract. Judge Thomas, for the Eastern District of New York, uses the following language (p. 521):

“The instrument dated May 25, 1899, was not negotiable, and therefore no value could be added to it by transferring it. In any case, whether it was ‘property’ or a ‘valuable consideration,’ within the meaning of the statute, so that an indictment could be based upon it within three years after its delivery to Driggs, depends upon its nature and value at the time of such delivery. At the outstart it is obvious that the instrument of May 25, 1899, embodied in part the agreement pursuant to which Driggs undertook to procure the contract from the government, and fixed the condition and times when he should receive compensation therefor. Although it be a fragment of such agreement, and such agreement was originally not in writing, the instrument of May 25th has the same qualities as if it contained all the terms of the agreement. An indictment otherwise correct, charging that the defendants offended by making the agreement, or by being parties thereto, would have been valid, if found within three years from the time of making it, as Section 1781 in terms forbids such an agreement to be made. *But an indictment based upon the instrument as embodying the agreement is quite different from an indictment for giving or receiving ‘money,’ ‘property,’ or ‘other valuable consideration’ upon the theory that such agreement was itself ‘property.’*”

The court goes further in its opinion to state that this agreement had no validity for the very reason that it was forbidden by statute and therefore void. In the case at bar it can very clearly, by analogy, be reasoned that since the delivery by Kettlewell of the check for \$7,417 was itself a fraudulent act, the entire transaction or method of delivery was tainted with fraud, which the government could have disclaimed at any period to the very moment of payment, or even thereafter. And the court holds the indictment would lie by reason of the fact that it was brought within three years of the payment of money under this fraudulent and criminal arrangement.

In the case of *Brown vs. Elliott*, 225 U. S. 400; 56 L. Ed. 1136, which was an application for a writ of habeas corpus, and contests the sufficiency of the indictment and the facts proven in support of an indictment in one of the notorious "Big Store" frauds, so familiar to readers of the daily press, a contention was made that no participation by one of the defendants was shown within the period of three years prior to the filing of the indictment. The Supreme Court, speaking by Mr. Justice Mc-

Kenna (p. 1140), quotes with approval the language of the court used in *United States vs. Kissel*, 218 U. S. 601, in which it was said:

“But when the plot contemplates bringing to a pass a continuous result that will not continue without the continuous co-operation of the conspirators to keep it up, and there is such continuous co-operation, it is a perversion of natural thought and of natural language to call such continuous co-operation a cinematographic series of distinct conspiracies, rather than to call it a single one.”

The court then further remarked:

“These remarks are especially pertinent to the case at bar. It is alleged in the indictment that the conspiracy set forth was designed to be and was continuous; *and, being so, every overt act was the act of all the conspirators, made so by the terms and force of their unlawful plot.*”

Adopting the reasoning of the court there used by Justice McKenna, to the case at bar, it is apparent that the act of Goldberg in subscribing this check in the name of Fowler Metal Company on June 1, 1908, and the act of Silverstone in depositing it to his account was in each instance an act for the benefit of each and all of the conspirators charged in the indictment.

The attention of the court is directed to the fact that the delivery of this check by Kettlewell as the representative of the government was made, not, by mailing a check to the address given on the bid, to San Francisco, but by the delivery to one of the conspirators in the transaction. This action of Kettlewell was a part of the same fraud and tainted every action in connection with the delivery.

If this be true, then there was no legal, binding delivery made by Kettlewell upon this occasion, and no act upon which to predicate a claim that the statute of limitation would begin to run. The only two acts in connection with the check which can in any measure be considered to be bona fide acts of the government would be the act of Paymaster Orr in drafting the check, and the act of the bank on June 2, 1908, in cashing it. The intermediate acts are each and all of them tainted with the fraud of the various conspirators. Each and every person handling the check from the moment it received the signature of Paymaster Orr, until it was deposited in Silverstone's account on June 1, 1908, was a party to this conspiracy, and charged as defendants in the case.

Counsel has referred to the decision in the case of *Hyde vs. United States*, 225 U. S. 356-358; 56 L. Ed. p. 1119. This learned court is so familiar with this case that it would seem impertinent to attempt anything more than a reference to it. It will be remembered that practically every act of the Hyde conspiracy was performed well outside of the three-year limit. The conspiracy was complete, but the object was yet unaccomplished. While the project slumbered certain acts within the statute were done to hurry forward the time when the unlawful fruits of conspiracy might be acquired. The Supreme Court held the evidence would sustain the charge. The court (p. 1122, L. Ed.), speaking through Mr. Justice McKenna, quotes with approval the language of Judge Woods in the case of *U. S. vs. Britton*, 108 U. S. 199, as follows:

“The provision of the statute that there must be an act done to effect the object of the conspiracy, merely affords a *locus penitentioe* (court’s italics), so that before the act is done, either one or all of the parties may abandon their design, and thus avoid the penalty prescribed by the statute.”

This is the language of the highest court of the Federal government and due weight must be given

to its clear and convincing declaration. If we measure the position of the defendants in the case at bar by this rule, would counsel for plaintiff in error still insist that their clients could not, without injury to the government, have repented of their misconduct after the receipt of this check?

Is it not apparent that at any time after its receipt, whether on May 26 or June 1, 1908, before it was deposited, the conspirators could have repented of the conduct and the government would then have sustained no loss. Even after deposit, and before it was presented and charged against the government account on June 2, they could have repented and the government would have been uninjured. Goldberg and Silverstone could have destroyed the check and the United States would not have sustained loss.

There remained to these conspirators a precise, definite moment, up to which time it was well within their power to repent and turn back from their purpose, and that was the exact moment when this check was stamped as paid and charged against the government fund on the books of the National Bank of Commerce. This date was June 2, 1908.

No distortion of the rules of logic can lead the mind to any other conclusion than that this was the day and hour when the government was defrauded, and the object of the conspiracy was accomplished. The certain test, as laid down by the Supreme Court, is that during all the time, until this moment, it was in the power of the conspirators to reconsider, deliberate and abandon their unlawful purpose.

EVIDENCE AS TO SALES OF ZINC.

Evidence was offered on behalf of the government as further substantiation of the fraudulent conspiracy leading up to this particular purchase, that the estimate fixed by Meyer and the bids offered in accordance with the agreement between the conspirators was outrageously extravagant, unreasonable and fraudulent. The ledger of the Storekeeper's office, reposing on a shelf within twelve feet of Meyer's customary desk, and at all times under his observation, showed the arrival at the Navy Yard of an exactly similar amount, almost three weeks to a day prior to that of April 1, 1908, the date of requisition 438, at a cost to the government of \$7.13 a hundred. The estimate fixed by Meyer was \$12.50 a hundred; a tabulation was made by Mr. House, an

expert accountant, in the employ of the government, and an employee of unusual skill, showing the prices of zinc of similar size, asked and obtained by the firms of Corder and the Great Western Smelting & Refining Company, for a period of many months prior to April 1, 1908, and for a number of months thereafter.

The period of time before, after and during the history of requisition 438 was fully covered.

Testimony was offered by the witness Nagus, and several Seattle representatives to show the usual and normal profit in sales of zinc similar in quality and size.

It would seem that no better nor fairer evidence could be obtained than that taken from the books of the defendants themselves.

Mr. House was called, not as an expert on the price of zinc, but as an expert accountant, able to fathom the mysteries of modern bookkeeping, and with the further ability to summarize this clearly for the court, counsel and jury.

On the question of the admissibility of the testimony of expert accountants, the attention of the court is called to the following citations:

Elliott on Evidence, Vol. 2, Sec. 1053:

“Accountants and Actuaries. * * * As they are competent to testify as to errors in an assessment book (15) and as to the results of the computations from the books and schedules of the assets and debts of a party, the same having been put in evidence (16). Such matters as the last are more in the nature of matters of fact rather than mere opinions, and it was observed by the court, in the last case cited that the witness did not state deductions and inferences of his own judgment, but did state results of computations. In another case, however, an accountant, who had been a bookkeeper and teller in a bank, was held competent to testify to handwriting by comparison. Citing *Tumberlake vs. Brewer*, 59 Ala. 112; *Jordon vs. Osgood*, 109 Mass. 457; 12 Am. R. 731; *Frick vs. Kabaker*, 116 Iowa 494; 90 N. W. 498.”

Elliott on Evidence, Section 1030:

Limits of Rule: “Where the facts can be placed before the jury and they are of such a nature that jurors generally are just as competent to form opinions in reference to them, and draw inferences from them as witnesses, then there is no occasion to resort to expert or opinion evidence. * * * But there are matters relating more or less to everyday affairs, rather than to any technical and obstruse science or art, on which ordinary men in the usual walks of life may have little knowledge, and on which the opinions of those who have given them particular study and have special and peculiar skill and experience may be helpful, and in such cases the opinions of such witnesses are fre-

quently admitted as the opinion of experts, although they are not, perhaps, in the fullest and most complete sense. * * * It is applicable wherever peculiar skill and judgment applied to a particular *subject are required to explain results or trace them to their causes.*”

Sheldon vs. Benham, 4 Hill 129; 16 N. Y. C. L. Rep. 769.

The court says:

“I see no objection to the testimony of the bookkeeper in relation to these memoranda. He was not called to give a construction, or to declare the legal effect of a written instrument; but as a person skilled in such matters to tell the jury what words these short entries stood for. It is not unlike the case of an instrument written in a foreign tongue, where a translator may be called in to tell the jury how the instrument reads. I think the evidence *properly received.*”

Frick vs. Kabaker, Supreme Court of Iowa; 90 N. W. 498.

Quoting from syllabus:

28. “When the accounts of merchants are in issue, a summary of footings by an expert who has examined their books is admissible.”

29. “When an expert testifies on an issue as to a merchant’s accounts, as to results of his examination of the merchant’s books, the refusal to admit his summary of the footings of the books is *harmless error.*”

Timberlake vs. Brewer, 59 Ala. 108-112.
Syllabus 8:

“*An expert may show that the addition is correctly made.* An expert, whether employed or not, who has examined the entries in the different columns, may with the books before the jury, point out the errors in addition previously made, the additions as correctly made, and the aggregate amount of the value of the taxable property of the county *as shown by the book.*”

Burton vs. Driggs, 87 U. S. (20 Wall.) 125;
22 L. Ed. 299:

“When it is necessary to prove the results of voluminous facts, or of the examination of many books and papers and the examination cannot be conveniently made in court, the results may be proved by the person who made the examination. *L. Greenl. Ev.*, Sec. 93. Here the object was to prove, not that the books did, but that they did not show certain things. The results sought to be established were not affirmative, but negative. If such testimony be competent as to the former, *a multo fortiori* must it be so to prove the latter.”

INDEFINITENESS OF INDICTMENT.

Some complaint is made by counsel for plaintiffs in error that certain parts of the indictment use the expression “on or about” in its description of the time of the offense. This is true of some parts in the indictment but not of all. In that part as quoted in the brief, found at page 8 of the transcript,

the time is alleged distinctly and clearly in the following words:

“to and including the 2nd day of June, 1908.”

The record in this case discloses that no demurrer was ever interposed on behalf of the defendants. No bill of particulars was requested. It would seem that if there was any criticism to be made of the indictment, it might properly have been made at that time.

The trial has now been had and the evidence is direct, positive and certain as to dates of certain matters charged in the indictment. The bank records of the unsuccessful and successful attempts to deposit this government check for \$7,417 show positively the date of June 1st, and no dependence upon the uncertain memory of human mind is necessary to establish this date.

Section 1025 of the Revised Statutes, found in volume 2, Federal Statutes Annotated, page 340, reads as follows:

“(Indictments, defects or form). No indictment found and presented by a grand jury in any district or circuit or other court of the United States shall be deemed insufficient, nor

shall the trial, judgment, or other proceedings thereon be affected by reason of any defect or imperfection in matter of form only, which shall not tend to the prejudice of the defendant."

In the face of this statute, and the certain, positive evidence disclosed by this record, the criticisms of the plaintiffs in error should have little weight with the court.

One of the leading cases from the Federal Reporter is the case of

United States vs. Wood, 127 Fed. 168.

In the case of

State vs. Elliott, 34 Tex. 150, the court says:

"In this country it is quite uniformly held that the averment of time in an indictment is a matter of form, and not generally material."

citing *Wharton's Crim. Law* 261; *Bishop's Criminal Practice* 237.

See also

Hutchinson vs. State, 62 Ind. 556.

Commonwealth vs. Nailor, 29 Pa. Super. Ct. 271.

Wells vs. Commonwealth, 78 Mass. (12 Gray) 326.

Commonwealth vs. Maxwell, 19 Mass. (2 Pick.) 141.

State vs. Perry, 91 N. W. 765, 117 Iowa 463.

Rema vs. State, 72 N. W. 474, 52 Neb. 375.

Commonwealth vs. Dingman, 26 Pa. Super. Ct. 615.

Am. Dig. Dec. Ed., Vol. 10, pp. 1560, 1561, 1562.

While little space is given in plaintiff in error's brief to a consideration of the voluminous evidence offered to the court in the four volumes of transcript, it is not improper to suggest, in conclusion, certain steps of the evidence which was so definitely and positively woven around the plaintiffs in error.

The record discloses that it was agreed as early as January between Goldberg and Kettlewell that he (Kettlewell) should receive twenty percent of the profits of this combination, Goldberg suggesting that Meyer as his part would receive a similar percentage.

As hereinbefore suggested in this brief, Goldberg admitted upon the witness stand (Tr. p. 795) that he and Corder had for a period of many months prior to this particular fraud been dealing with the government in their several names, but dividing between them the profits made in any award, whether made to Goldberg or to Corder.

The court then will be interested in the irrefutable logic of certain checks that are a part of the record, and which corroborate perfectly the statement of Kettlewell as to the percentage which he was to receive.

The cost to the conspirators of the zinc delivered on requisition 438 was shown by the books of the defendants to be computed as follows:

"59,575 pounds at \$5.80 per cwt.....	\$3,455.35
Freight to Seattle, 59,575 at \$1.25	
per cwt.	744.69
Freight to Bremerton (Gov. Ex. 23;	
Trans. p. 588)	60.75
Total cost	<u>\$4,260.79"</u>

The profit of the transaction, to be divided among the conspirators, will be shown as follows:

Amount received from the zinc.....	\$7,417.09
Total cost of the material	<u>4,260.79</u>
	\$3,156.30

Kettlewell's twenty per cent of this profit of \$3,156.30 would come out of either Corder's share or Goldberg's share in any settlement made between Corder and Goldberg.

On June 2, 1908 (Ex. 25; Tr. p. 594), Corder issued to the Great Western Smelting & Refining Company a check for \$2,109.60, while on the same day Corder received credit on the books of the Great Western Smelting & Refining Company in the sum of \$1,479.60, leaving an unexplained difference of \$630.00, which is within \$1.00 of the twenty per cent which Goldberg was obligated to pay Kettlewell, and which must have been retained by him for that purpose.

No explanation was attempted by Mr. Goldberg or his capable counsel of the meaning of these convincing and convicting figures.

At or about the time this requisition 438 started on its way the plaintiff in error Goldberg started upon the books of the Great Western Smelting & Refining Company an account designated as a "Bonus Account," in the sum of \$5,000.00, and through this account was juggled back and forth those inexplorable items which would have caused serious confusion if they had appeared on the books of the Great Western Smelting & Refining Company as acts done for and by that corporation. This bonus account fades with remarkable rapidity

.

during the first two months of its existence. Goldberg's explanation that this was a gift made by his appreciative employers, allowed by them at so much per month and covering a future period of some two or three years, made no impression upon the jury, and was quite in line with the general irresponsibility of his testimony. The testimony of either Goldberg or Meyer, astute and shrewd as the latter must be confessed to be, would have convicted him before the jury. The defense of Meyer centered around the statement of his counsel, and the original declaration of the witness himself, that his relations with Kettlewell were at the time of the conspiracy not not only friendly, but positively unfriendly. Meyer denied that he ever called upon or had any relation with Kettlewell during this period, yet later confessed in his cross-examination that during the time referred to, beginning April 1, 1908, that he had repeatedly visited Kettlewell in the latter's office in Seattle to help him, as he explained, with the over-burdened duties of Kettlewell's office.

The unimpeachable testimony of the ferro-manganese, and other dealers, made a part of the record, telling of other favorite contracts engineered

by Meyer for and on behalf of Goldberg, are convincing beyond doubt as to Meyer's criminal responsibility.

The jury was one of unusual intelligence and listened with patience to this trial of nearly three weeks, and returned its verdict, after reasonable and proper deliberation, against each of the plaintiffs in error.

The verdict of this jury, and the judgment of the court were just and right and should be sustained.

Respectfully submitted,

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No. 2413.

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT.

**EDWIN F. MEYER and
EMAR GOLDBERG,**

Plaintiffs in Error,

vs.

THE UNITED STATES OF AMERICA,

Defendant in Error.

Reply Brief of Plaintiffs in Error.

KERR & McCORD,
MORRIS & SHIPLEY,
A. R. BLACK,
BERT SCHLESINGER,
Attorneys for Plaintiffs in Error.

Filed this.....day of December, A. D., 1914

FRANK D. MONCKTON, Clerk.

By.....Deputy Clerk

Filed
THE TEN BOSCH COMPANY, SAN FRANCISCO

DEC 25 1914

F. D. Monckton.

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REPLY BRIEF OF PLAINTIFFS IN ERROR

The defendants, in their reply brief, attempt to contradict plain and indisputable facts proven on the trial, in a futile endeavor to establish that the check in the case at bar was delivered on June 1, 1908, instead of on May 26, 1908, as unquestionably proven. They make this bold statement, in an

attempt to resolve this into a question of fact, thereby admitting their inability to successfully controvert our argument as a question of law:

“THE RECORD IS NOT CLEAR AS TO THE TIME OF THE DELIVERY OF THIS CHECK OR THE PERSON TO WHOM IT WAS DELIVERED.” (Brief of Defendant in Error, p. 21.)

There is not a syllable of evidence to the effect that this check was delivered on June 1st, 1908, and they do not point out any evidence. Here is the absolutely conclusive evidence of both Government and defendant showing that the check was delivered on the 26th day of May, 1908. There is not a word to the contrary.

“Mr. Schlesinger: I want to call your attention, Mr. Kettlewell, to what purports to be a copy of a public bill. Do you recognize that as a true copy?”

A. Yes, sir; I think that is a true copy.

* * * * *

Q. Now, calling your attention to this stamp (showing), will you kindly read that aloud so the jury may hear you?

Mr. Allen: Is that introduced in evidence?

Mr. Schlesinger: Yes, and marked Exhibit ‘G.’

A. ‘United States Navy Pay Office, Seattle, Washington. Paid May 26, 1908. Robert H. Orr.’ The rest is blurred.

Q. And that is marked 'Paid,' is it, on May 26th, 1908? I will ask you whether the check was delivered together with that paper on that date?

A. I think that it must have been, yes.

The Court: What date was that?

Mr. Schlesinger: May 26th, 1908. If it had not been so delivered it would not bear the imprint 'Paid,' would it?

A. No, I think not." (Trans., p. 428-429.)

The testimony of J. A. Kettlewell, the chief Government witness, shows the date of the delivery of this check, and is substantiated by the testimony of Emar Goldberg, and the receipted bill conclusively shows that the check was delivered on the 26th day of May, 1908.

"Q. Now, Mr. Kettlewell, I show you Plaintiff's Exhibit '5' and call your attention to the photographic copies of that first instrument there. Do you know what the instrument is of which this is a photographic copy?

A. Copy of check issued from the navy pay office in payment for this Fowler Metal Company's zinc.

Q. When that check was made out, then what happened?

A. When this check was made out I phoned to Mr. Goldberg and told him that the check was ready, and the check was delivered either to Mr. Goldberg or to Mr. Silverstone, I don't remember which.

Q. What day was it delivered?

A. Delivered June first, no DELIVERED—DELIVERED—DELIVERED THE DAY IT WAS DATED, MAY THE 26TH.

Q. May the 26th?

A. The DAY IT WAS DATED.

Q. You don't remember to which MAN it was delivered?

A. I couldn't say.

Mr. Schlesinger: YOU MEAN MAY 26, 1908?

A. 1908, YES, SIR.

Q. When the check was delivered?

A. Yes, sir, THE DAY THE CHECK WAS MADE, AS I REMEMBER, IT WAS DELIVERED.

Special Counsel Mr. Riddell: AS YOU REMEMBER, THE CHECK WAS DELIVERED THE DAY IT WAS MADE?

A. As I remember. It may have been delivered the next day, but I THINK IT WAS THE DAY IT WAS DATED. That was the usual procedure, and I know we would want to get rid of it as soon as possible." (Trans., pp. 304-307.)

Emar Goldberg, corroborating his testimony, said:

"Q. What date was it that you received the checks from his hands?

A. On the 26th day of May.

* * * * *

Q. In other words, you received that check upon the 26th day of May, and that check rested in your office until the 31st day of May?

A. Until the 1st day of June. (Trans., p. 715.)

Q. What, if anything, accompanied that check?

A. What they call a public bill.

Q. Have you that public bill with reference to this?

Mr. Allen: It is in evidence.

Mr. Schlesinger: What is the number of the exhibit?

Mr. Shipley: Why, it is here, Mr. Schlesinger.

Mr. Schlesinger: I will ask you whether this so-called public bill accompanied that check?

A. Yes, sir, this public bill was with the check.

Mr. Kerr: Refer to it as an exhibit number.

A. Yes, this is defendant's Exhibit Letter 'G.'

Q. What did you do with this public bill at the time that it was given to you by Kettlewell together with the check?

A. Put the bill in our files, put this in our files.

Q. On what date?

A. ON THE 26TH DAY OF MAY, 1908.
(Trans., p. 716.)

We submit, without further remarks, that our contention as to the day on which the check was delivered is correct, and not subject to dispute.

NOT ONLY IS THE EVIDENCE CONVINCING THAT THE RECEIPT OF THE CHECK WAS THE LAST OVERT ACT, BUT THE INDICTMENT ITSELF CLAIMS AND ADMITS THAT THIS WAS THE FINAL CONTEMPLATION AND OBJECT OF THE CONSPIRACY.

We think the whole issue in this case can be expressed in a single proposition, namely: What was the date of the last overt act of the conspiracy? It has been our contention, and still is our contention, that the last overt act was at least the receipt of the check on May 26, 1908. It is the contention of the government that the last overt act occurred on June 2nd, 1908, when the check was deposited in a bank.

We have shown that the check was delivered and received as payment; that after its receipt no transactions with the government of any nature whatever were necessary. We have shown that the conspiracy is ended with the date of the receipt of the check, and that an overt act cannot possibly succeed the completion of the substantive offense, which itself was to defraud the government out of a check. The indictment itself bears this out when it states that the substantive offense at which the conspiracy aimed, was the GETTING OF A CHECK from the government and not the depositing of the check, which they were to receive from the government.

On page 8 of the indictment we find the following:

“That the said fraudulent scheme contemplated that * * *

Then follows a number of things which the scheme contemplated, ending up finally on page 12 with the following object contemplated by the conspiracy:

“should recommend and secure the issuance by the Paymaster at the United States Navy Pay Office at Seattle, Washington, of a check pay-

able to the order of the said Fowler Metal Company according to the account so to be rendered as aforesaid, and should arrange to have said check delivered to said E. Silverstone or said Emar Goldberg."

And that this check was delivered as and for payment, and was received as such, is clearly settled by the terms of the indictment itself, for it states:

" * * * AND IN ISSUING, MAILING AND DELIVERING TO THE SUCCESSFUL BIDDER THE CHECK OF THE PAYMASTER OF THE UNITED STATES NAVY PAY OFFICE AT SEATTLE, WASHINGTON, FOR AND IN PAYMENT OF THE CLAIM OF SUCH SUCCESSFUL BIDDER FOR SUPPLIES SO FORWARDED TO THE STOREKEEPER, NAVY YARD, PUGET SOUND, WASHINGTON." (Trans., p. 6.)

The offense is thus circumscribed by the plain terms of the indictment. In other words, the scheme contemplated finally that the Paymaster of the United States Navy Pay Office should deliver a check to E. Silverstone or Emar Goldberg, and this delivery occurred on May 26th, 1908.

It is our contention, as will be seen by reference to our opening brief, that the check was received as absolute payment, and therefore ended both the conspiracy itself and the substantive offense.

Counsel for the defendant in error have to admit, and do admit in several places in their brief, that by agreement between the parties a check may be

accepted as final payment, and completely terminate the transaction between the parties thereto. On page 41 they make the following statement in italics:

“A check is not payment unless by express stipulation or distinct agreement of the parties, they so agree.”

In support of this proposition they cite six cases. We call the Court's attention to the limitation expressed thereof—UNLESS BY EXPRESS STIPULATION OR DISTINCT AGREEMENT OF THE PARTIES, THEY SO AGREE.

On page 45, they quote from the case of *Duncan v. Kimball*, 3 Wall. 37, 18 L. ed. 50. Beneath that they make the following statement:

“The words of Chief Justice Marshall were quoted with approval in the case of *Segrist v. Crabtree*, 33 L. ed. 126:

“‘That a note, WITHOUT A SPECIAL CONTRACT, would not, of itself, discharge the original cause of actions, is not denied.’”

The learned counsel go on to express the status of a check in the State of Washington. They cannot get away from this limitation as regards payment by check, even in the cases that they cite in that jurisdiction.

On page 47 we find them quoting from the case of *Benham v. Columbia Canal Co.*, 74 Wash., 110-119, as follows:

“It is the general, if not the universal, rule that payment in anything other than money can only be made upon the distinct AGREEMENT OF THE CREDITOR WITH THE CONSENT OF THE DEBTOR TO ACCEPT THE THING AS PAYMENT.”

On the next page is a quotation from the case of *Exchange National Bank v. Hunt*, 75 Wash. 516, as follows:

“The question then is, did the taking of the promissory note for a pre-existing liability, which was covered by the guaranty, constitute a payment of the debt, and thereby release the guarantors? The rule is that the taking of a promissory note for an antecedent liability does not constitute payment of the debt IN THE ABSENCE OF AN AGREEMENT TO THAT EFFECT, OR EVIDENCE THAT SUCH WAS THE INTENTION OF THE PARTIES.”

The learned counsel, therefore, evidently acknowledged that our statement of the law is correct. It cannot be questioned that the Government could have delivered a bond in payment, a mortgage in payment, or any other instrument in payment; and if accepted as such, it certainly would end the transaction, regardless of whatever use the recipient might make of the article or instrument so received.

Now, the only question remaining is: What is

the evidence in support of our proposition? That we will now attempt to set forth.

The indictment sets out the duties and powers of Kettlewell. Besides other duties and powers, he had a duty, power and discretion in "mailing and delivering to the successful bidder the check of the Paymaster of the United States Navy Pay Office at Seattle, Washington, FOR AND IN PAYMENT OF THE CLAIM OF SUCH SUCCESSFUL BIDDER for supplies so forwarded to the Storekeeper, Navy Yard, Puget Sound, Washington." (Trans., p. 6.)

In other words, Kettlewell not only had the power to deliver the check, but he had the power to deliver it *in payment* of the claim of the successful bidder, and that it was so delivered, as and for payment, the indictment avers, and this fact is not disputed.

It is true that Kettlewell is conceded to be a great scoundrel and monumental liar; but he is the Government's witness, and as to the date of the delivery of this check, he certainly should be believed, especially as he is corroborated by documentary evidence (Exhibit G, Public Bill), and all of the evidence in the case. Therefore, with respect to this phase of the case, he is not to be disbelieved. And the receipted public bill, Exhibit G, showing payment on May 26, 1908, demonstrates our position beyond any question. This bill is stamped "Paid, May 26, 1908."

In the recent case of *McKenzie v. Ray*, 48 Cal. Dec. 453, decided October 13, 1914, the effect of a receipt is discussed by the Court. We quote as follows:

“The Court properly decided the question regarding the effect of a receipt in full. WHILE NEITHER AN ORDINARY RECEIPT NOR A RECEIPT IN FULL IS CONCLUSIVE AGAINST ALL ATTACK, IF UNCONTRADICTED AND UNEXPLAINED, IT STANDS AS CONCLUSIVE. (30 Cyc. 1224; note 30 on p. 1225.) A receipt in full of all demands, if unexplained and uncontradicted, will defeat an action on a promissory note given before the date of the receipt. (*Cunningham v. Bacchelder*, 32 Me. 316.) Such a receipt in the absence of evidence of fraud, mistake or non-payment, is a complete bar to the action. (*Viridin v. Stockbridge*, 74 Md. 481; *De Arnoud v. United States*, 151 U. S. 483; *Jones on Evidence*, 2d ed. Pars. 491 and 492).

In this connection we call the Court's attention to the cases cited in our opening brief, pages 50, 58, 111, and 112 to 114, inclusive.

THE CRITICISM BY THE GOVERNMENT OF CERTAIN CASES IN OUR OPENING BRIEF ON THE QUESTION OF OVERT ACTS, IS ILLOGICAL, AND THEIR SIMILARITY TO THE CASE AT BAR IS HEREIN ONCE MORE SHOWN.

The counsel for defendant in error attack a number of the cases upon which we relied in our brief, notably *United States v. Black*, *United States v. Lonabaugh*, and *United States v. Kissell*.

In speaking of the *Lonabaugh* case, they make the statement that it is not in point, because all the

overt acts therein performed occurred well within the three years' limitation period. Their criticism of the other cases cited by us is to the same effect. Such a criticism in no way joins issue with our argument, and in effect begs the question. It is almost droll. Put in the form of a syllogism, their reasoning appears as follows:

In every case in which the overt acts are committed within the three years' limitation period, the Statute of Limitations will run.

In the case at bar, overt acts were committed subsequent to the three years' limitation period.

Therefore, the Statute of Limitations has not run.

What is this but begging the question? The minor premise here assumed as taken for granted by counsel for defendant in error is the very point in issue. It is not necessary to have made an exhaustive study of formal logic to perceive at a glance the fallacy of this sort of argument. When the learned counsel proves to the satisfaction of the Court, the truth of his minor premise, we will grant the correctness of his reasoning, but not before. We will even give him a little help, if we possibly can, by forming a syllogism for him, leaving him to fill in the blanks.

Major Premise:
is always an overt act.

Minor Premise:
occurred in the case at bar within three years of the filing of the indictment.

Conclusion: Therefore an overt act occurred subsequent to the three years' limitation period.

We say, without hesitation, that if we could fill out the blanks in the above syllogism we would gladly do so. But we feel certain that they cannot be filled in with propositions that will not in themselves be open to question.

We submit, however, that we have correctly reasoned concerning these cases attacked by the counsel for defendant in error in opening brief, and for the benefit of the Court we will here put that reasoning into the form of a syllogism.

In the *Lonabaugh* case, *Kissel* case, *Brown v. Elliott*, *United States v. Black*, etc., certain acts which we have dwelt on with considerable detail in our opening brief, occurring within three years of the filing of the indictment, were held by the Court not to be overt acts.

In the case at bar, the acts alleged to have been done between May 26th, 1908, and May 31st, 1911, are absolutely analogous to these acts in the cases above mentioned.

Therefore, they were not overt acts in pursuance of the conspiracy, but the results thereof.

The similarity between THE LONABAUGH CASE AND THE CASE AT BAR is so striking that we put excerpts therefrom in parallel columns with a paraphrase of the same features in this case. (This case has been uniformly followed, and approved in *Brown v. Elliott*, decided in 1912.)

LONABAUGH CASE.

On page 479 of the report Mr. Justice Vandeventer says:

"Of the issuance of the patents little need be said. It was not the acts of one or more of the conspirators, but of the officers of the Land Department at Washington who were acting solely in behalf of the United States. And while it doubtless was induced by what the conspirators had done in giving to the entries a lawful appearance, when they really were fraudulent, the fact remains that all that was done by the conspirators in that connection occurred more than three years before the indictment was found."

Again, on page 481, we find the Court saying:

"The conspiracy came within the interdiction because it had for one of its objects the defrauding of the United States of certain of its public lands, and that object was effected, when as a result of the deceit practiced upon the officers of the land department, the lands were patented to entrymen who were not entitled to them considering the antecedent agreement or obligation in pursuance of which the entries were secured."

Justice Vandeventer, then Circuit Judge, continued:

"But it is contended that the conspiracy was not limited to the defrauding of the United States of the lands, but included the transfer of them to the corporations, and until both of these things were done, the object of the conspiracy was not effected. Passing the question whether or not the indictment charges

CASE AT BAR.

With but little alteration to suit the facts of the case at bar that may be made to read:

"Of the issuance of the check little need be said. It was not the act of one or more of the conspirators, but of the officers of the Navy Pay Department at Seattle. And while it doubtless was induced by what the conspirators had done in giving to their requisition a lawful appearance, when it really was fraudulent, the fact remains that all that was done by the conspirators in that connection occurred more than three years before the indictment was found."

Paraphrasing this extract to suit the facts of the case at bar, it will read as follows:

"The conspiracy came within the interdiction because it had for one of its objects the defrauding of the United States of a certain check, and that object was effected when, as a result of the deceit practiced upon the officers of the Navy Pay Office, the check was issued to the defendants in consideration of the antecedent agreement or obligation in pursuance of which the check was secured."

Paraphrasing:

"But it is contended that the conspiracy was not limited to the defrauding of the United States of the check, but included the transfer of it between the conspirators and a subsequent deposit thereof in the bank, and until both of these things were done the object of the conspiracy was not effected. Passing the question whether or not the

the object so broadly, and treating the evidence as sufficient in that regard, we come at once to test that contention in the light of the statute."

* * * * *

"Section 5440 does not interdict all conspiracies, but only those whose object is 'either to commit any offense against the United States or to defraud the United States in any manner or for any purpose,' and then only when one or more of the conspirators do some 'act to effect the object of the conspiracy.' It is enough that the conspiracy be directed to the attainment of some unlawful object, or to the attainment of some lawful object by unlawful means; it must be directed to the attainment of one of the objects specified. Nor is it enough that the overt act be directed to the attainment of some other object; it must be directed to the attainment of the object which brings the conspiracy within the interdiction; and when that object is attained 'the object of the conspiracy,' in sense of the statute, is effected."

indictment charges the object so broadly and treating the evidence as sufficient in that regard we come at once to test that contention in the light of the statute.

Every word of the opposite excerpt is applicable to the case at bar.

"Section 5440 does not interdict all conspiracies, but only those whose object is 'either to commit any offense against the United States or to defraud the United States in any manner or for any purpose,' and then only when one or more of the conspirators do some 'act to effect the object of the conspiracy.' It is enough that the conspiracy be directed to the attainment of some unlawful object, or to the attainment of some lawful object by unlawful means; it must be directed to the attainment of one of the objects specified. Nor is it enough that the overt act be directed to the attainment of some other object; it must be directed to the attainment of the object which brings the conspiracy within the interdiction; and when that object is attained 'the object of the conspiracy,' in sense of the statute, is effected."

HOUSTON AND BULLOCK v. THE UNITED STATES.

The counsel for the defendant in error has taken great comfort in a recent decision handed down by the Circuit Court of Appeals in the case of *Houston and Bullock v. The United States*, not yet reported.

This case is a tacit acknowledgement of the correctness of our contention that the last overt act was

the receipt of the check, because the district attorney deliberately introduced into the indictment in that case allegations that the defendants conspired to defraud the Government out of its legal remedies. Here we have in effect an admission that without such allegation the indictment would have been barred by the statute of limitations.

We have carefully read the opinion of the majority Judges in that case and fail to see the cause of the learned counsel's jubilation therein.

In the Bullock case it was contended that the conspiracy terminated with the letting of the contract, or the making of the award. In that case the checks were issued on August 13, 1908, and the indictment filed August 12, 1911. This, of course, brought the delivery of the check, taking the issuance of the check as the last date, still one day within the statute of limitations. In the majority opinion the Court said: (pages 12-13 Majority Opinion):

“It is urged that the statute commenced to run on April 21, 1908, the date when the contracts were let for furnishing the coal for Forts Davis and St. Michaels, or that, at the latest, the statute began to run on July 13, 1908, the date when Bullock certified to the vouchers. The object of the conspiracy was alleged to be to defraud the United States, and there was proof of acts done by the defendants, which showed that the purpose of the conspiracy was not fully consummated when the vouchers were certified to. That act was followed by others.

On August 13, 1908, at the instance of Bullock, Baxter issued the checks; on September 1, Kane, under authority from Bullock endorsed the checks on behalf of John J. Sesnon Co., and September 2, the bank paid the checks. The indictment was found on August 12, 1911."

In the case at bar the award was made on Wednesday, the 15th of April, 1908. The check was issued on May 26, 1908, and deposited June 2, 1908. The indictment was returned on May 31, 1911.

It is quite evident that the special assistant attorney general, in that case, was of the opinion that these circumstances were a serious hindrance to the prosecution of the case, and hence they were careful to have the indictment charge that the conspiracy embraced a scheme to "bar the United States of its legal remedies to recover moneys of which it was to be defrauded." There is no such charge in the case at bar.

The dissenting opinion, filed by Circuit Judge Ross, states:

"But the indictment does not charge that the check or warrant therein referred to had any connection with any bid or proposal by the alleged conspirators for the sale to or purchase by the United States of any coal at exorbitant prices by means of pretended and fraudulent competitive bids, or otherwise.

"The present indictment was undoubtedly drawn with the manifest purpose, as I think, of avoiding the bar of the statute of limitations; for, as has been shown, notwithstanding the fact

that it makes no mention whatever of the making of any bid or proposal by or on behalf of the alleged conspirators or either of them for furnishing and selling to the Government any coal in response to the advertisement of its Quartermaster, or otherwise, yet on the trial the Government introduced evidence not only that the defendants did make such bids for the furnishing and sale to it of the coal advertised for, at exorbitant prices, but that such bids and proposals, while nominally competitive, were really fraudulent and made pursuant to the agreement of the defendants thus to defraud the United States."

In the case at bar, however, the check was issued on May the 26th, 1908, and delivered on that date, and the indictment was not returned until May the 31st, 1911. Therefore, the indictment was filed after the statute of limitations commenced to run. In the Bullock case the checks were issued on August 13th, 1908, but the indictment was found on August 12th, 1911. This, of course, brought the issuance of the check within the three-year statutory period, and therefore, any language concerning the nature of the transaction was clearly *dicta*. But we find therein no language detrimental to our position. The conspiracy itself was totally different. The indictment in particular alleged sufficient acts, and the Court found acts, in pursuance of the conspiracy, in existence as late as 1911, or three years after the issuance of the check. The indictment alleged, not only that the conspiracy was to defraud the

United States of divers large sums of money, but also to deprive the United States of ITS LEGAL REMEDIES TO RECOVER THE MONEYS OF WHICH IT WAS TO BE DEFRAUDED. And it was found that this part of the conspiracy continued up to the very moment on which the indictment was filed.

Again, the conspirators corruptly induced the Quartermaster of the United States Army to issue the check bearing the date of August 13, 1908, and he actually did issue the check after having been corruptly persuaded to issue it.

This is totally different from the facts concerning the issuance of the check in the case at bar. On page 57 of the Government's brief in the present case, it is said that the only two acts in connection with the check, which can in any measure be considered the bona fide acts of the Government, were the act of Paymaster Orr in drafting the check and the act of the bank on June 2, 1908, in cashing it. Yes, but counsel for the Government ignore that the check of Paymaster Orr was dated on May the 26th, 1908.

Hence, if the learned counsel rely upon the Bullock case, this would seem at once to be acknowledgement of the fact that the object of the conspiracy in the case at bar was the issuance of the check, while the object of the conspiracy in the Bullock case could not possibly have been the issu-

ance of the check, because, in order to get what the conspirators in the Bullock case were aiming at, it was necessary for them, as one of the acts in pursuance of that conspiracy, *to corrupt* and induce the Quartermaster of the United States Army to issue the check, in order that they could make the next step forward to their goal. The issuance of the check in the case at bar was the goal. The issuance of the check in the Bullock case was merely a step towards the goal.

Supposing, in the case at bar, the indictment charged that the object of the conspiracy was to obtain the delivery of a mortgage for the materials, or the delivery of a bond, or the delivery of any other instrument in writing—would it be contended that the sale of the mortgage, or exchange of the bond, or other instrument, would be an overt act? The disposal of the article does not add to the crime. The defendants might have purchased a house with the check or the avails thereof, or might not have disposed of it at all. Their subsequent dealings with the check are absolutely immaterial.

Under both the Majority and Dissenting opinions, this case must be reversed.

THE COURT COMMITTED PREJUDICIAL ERROR IN ADMITTING AS EVIDENCE OF UNREASONABLE PROFITS, VARIOUS SALES OF OTHER KINDS AND DESCRIPTIONS OF ZINC TO OTHER PURCHASERS UNDER TOTALLY DISSIMILAR CONDITIONS.

The brief of the defendant in error shows a total misconception of our argument as to the admissibility of the evidence offered at the trial, of sales of zines at various times from the books of the Great Western Smelting and Refining Company and the W. A. Corder Company.

The indictment charged with respect to sales of zinc that the object of the conspiracy was that the United States should purchase zinc rolled sheets and boiler plates at a price *greatly in excess of its real value*, and the *conspirators should obtain unreasonable profits*, etc. To prove this, the Government offered in evidence sales of various zines of **VARIOUS KINDS and DESCRIPTIONS**, varying entirely from the **KINDS AND SIZES OF ZINCS SOLD** to the Government in the transaction in question.

And it further appeared from his testimony that supplies to the navy yard had to be shipped in an unusual and peculiar manner. We append below a table which we have compiled after a careful analysis of Mr. House's testimony, showing the dates, amounts, prices, description and purchasers of various zines sold by the Corder Company or the Great Western Smelting and Refining Company, to show that these sales did not take place under the conditions, or under the same circumstances, as the sale of the zinc in question to the navy yard. This table follows:

THE ZINCS IN REQUISITION No. 438 WERE
1 x 6 x 12 in. SIZE.

Date.	Amt.	Price.	Description.	Purchaser.	Remarks.
Sept. 4, '07	4587 lb	@ 9.50—435.77 Cartage 1.00 <hr/> Total 436.77	Zinc Plates	John Sims Met. Wks.	Tr. p. 542 jobbers.
Sept. 4, '07	1036 lb	@ 9.55—958.44 Cartage 3.00 <hr/> 961.44	Zinc Plates	Pac. Engi- neering Co.	Tr. p. 542 jobbers.
Nov. 20, '07	3992 lb	@ 9¼c—369.26	8 bxs. zinc plates ½ x 6 x 12	John Sims Met. Wks.	Tr. p. 543
Dec. 3, '07	3713 lb	@ 10¼c—380.58	9 rolls zinc plates ½ x 24 x 36 9 rolls: ½ x 24 x 48 9 rolls: ⅝ x 24 x 36	U. S. Navy Pay Office Order 58 N. S. F.	Sales sheet of W. A. Corder Co. Tr. 545 G. W. S. Co. ½ profit
Dec. 30, '07	1058 lb	@ 11c— 116.36	9 cases ½ x 34 x 36 ½ x 24 x 36 rolled zinc plates	U. S. Navy Pay Office Order #66 N. S. F.	Sales sheet Corder Co. Tr. p. 547
Dec. 30, '07	2848 lb	@ 11c— 341.88 @ 12c	11: ½ x 24 x 36 @ 11c ½ x 24 x 36 @ 12c	U. S. Navy Pay Office	W. A. Cor- der Co. Tr. p. 547
Dec. 27, '07	4421 lb	@ 11c— 486.31	½ x 24 x 36	" " U. S. N. P. O.	W. A. Cor- der
Dec. 27, '07	5084 lb	@ 11c— 559.24	½ x 24 x 36	U. S. N.	W. A. Cor- der
Dec. 3, '07	1125 lb	@ 10¼c—115.31	1 x 6 x 12	Lewis, An- derson, Ford Co.	W. A. Cor- der jobbers, Tr. p. 549

Attention is called to the sales of December 27, 1907, in the table, where sales of zinc of the size of $\frac{1}{2}$ x 24 x 36 were made; to the date of December 3, 1907, where sales of zincs of $\frac{1}{2}$ x 48 and of $\frac{5}{8}$ x 24 x 36 were made; the prices on these vary. The zincs supplied to the navy yard on requisition No. 438 were 1 x 6 x 12, a totally different size plate, and it is reasonable to suppose that the prices thereon would not be the same as the prices quoted in the table above.

It is needless here to repeat the cases in support of this proposition, because they are given in our opening brief, and the rule of evidence is well settled that the evidence of values is inadmissible, unless the sales are of similar articles, under similar conditions and similar circumstances.

This error was highly prejudicial, as it made the jury believe that we had obtained unreasonable prices, whereas, in fact, this was not so. And Mr. House, being merely an expert accountant, was incompetent to testify to any of these sales, under any circumstances, he not being a dealer, or engaged in a similar business.

A CAUSE OF ACTION FOR FRAUD ACCRUES WHEN THE SALE AND TRANSFER OF THE PROPERTY FRAUDULENTLY BARGAINED FOR IS COMPLETED, REGARDLESS OF THE DATE UPON WHICH PAYMENT IS MADE.

Since writing our opening brief, we have come across a number of additional cases in support of the above proposition. These cases uniformly hold that where property is fraudulently sold to another, the cause of action commences at the moment the sale is entered into, regardless of the fact that no damage is done to the defrauded purchaser, until he pays the money. It is stated in these cases that no regard is paid to the time when the actual damage results. But the defrauded purchaser has a right of action, regardless of the pecuniary loss which is suffered by him after payment of the money.

In the recent case of *Ball v. Gerard*, 146 N. Y. S. 81, decided in February, 1914, the plaintiff was induced by the defendants to subscribe on December 1, 1906, for stock in a corporation, which subscription was thereupon accepted, and to pay one-half of the price on that date, and the balance on March 1, 1907. The Court held that limitations ran against a right of action for damages from December 1, 1908, the falsity of the representations existing then, if at all, and the plaintiff being then deprived of the value of his contract. The Court, speaking through Judge Clarke, said:

“In the case at bar the sale was completed when the contract was made. Reciprocal rights then became fixed. It made no difference that a subsequent part payment was to be made or that certificates were to be delivered. The con-

tract had been made. Either party would have been entitled to sue upon a breach by the other. It was the value of this contract which the plaintiff was entitled to. It was this contract which had been made upon reliance upon the false and fraudulent representations alleged, and it was the damage, caused to the plaintiff by the subject-matter of this contract not being as represented, for which he sues.

“In *Miller v. Wood*, 116 N. Y. 351, 22 N. E. 553, the Court said:

‘The defendants by false and fraudulent representations, induced the plaintiff to purchase a mortgage which was without actual value. The sale was consummated on the 12th day of April, 1878. On the 23d day of September, 1885, a little over seven years after the purchase, the plaintiff commenced this action by means of which she sought to recover the amount of damages sustained by reason of the fraud practiced upon her by these defendants. The trial court rightly determined the plaintiff’s claim to have been barred by the statute of limitations prior to the commencement of this action. The cause of action accrued to plaintiff when the sale and transfer were completed, to-wit: April 12, 1878.’

“Here again is a real estate transaction and required to be evidenced by a written instrument, and of course for purposes of litigation the execution and delivery of that instrument fixed the time.”

In *Wilcox v. The Executors of Plummer*, 4 Pet. 172, 7 Law. Ed. 821, it was held that the statute of limitations commences to run from the time the

action accrues, regardless of the time that the damage was developed or became definite. The Court adopted as its decision the view of Mr. Daniel Webster, who was counsel in the case. A part of Mr. Webster's argument, as reported in 7 Law Ed., is as follows:

“The law regards the time when the cause of action arises, not the time when the degree of injury, more or less, is made manifest; and when the cause of action is a breach of promise or neglect of duty, the right to sue arises immediately on that breach of promise or neglect of duty; and this right to sue is not suspended until subsequent events shall show the amount of damage or loss. This may be shown at the time of trial; or, indeed, if it be not actually ascertained at the time of trial, the jury must still judge of the case as they can, and assess damages according to their discretion.

“A rule different from this would be attended with one of two consequences—either no action could be brought in such a case until the full amount of injury was ascertained, or a fresh and substantive cause of action would arise on every new addition to the probability of loss.”

In *Aachen & Munich Fire Ins. Co. v. Morton*, 156 Fed. 656 (C. C. A.), the Court, speaking through Circuit Judge Lurton, said:

“But, passing the question without express decision, we think that relief must be denied, because plaintiff's right of action arose more than six years before this suit was begun. A

right of action accrues whenever such a breach of duty or contract has occurred, or such a wrong has been sustained, as will give a right to then bring and sustain a suit. That the statute begins to run from the time that a right of action accrues, without regard to when the actual damage results, is well settled. 26 Cyc. 1065, 1069, 1116, and cases there cited: *Wilcox v. Plummer*, 4 Pet. 172, 7 L. Ed. 821."

We contend that the defendant in error has failed to refute our arguments in its reply brief. We therefore pray the Court to grant us the relief asked for in our opening brief, namely, that the judgment be reversed.

Respectfully submitted,

KERR & McCORD,
MORRIS & SHIPLEY,
A. R. BLACK,
BERT SCHLESINGER.

No. 2413

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

EDWIN F. MEYER and
EMAR GOLDBERG,

Plaintiffs in Error,

vs.

THE UNITED STATES OF AMERICA,

Defendant in Error.

Petition for Rehearing

KERR & McCORD,
BERT SCHLESINGER,
MORRIS & SHIPLEY,
A. R. BLACK,

Attorneys for Plaintiffs in Error.

Filed this.....day of March, A. D., 1915

FRANK D. MONCKTON, Clerk.

By.....Deputy Clerk.

THE TEN BOSCH COMPANY, SAN FRANCISCO

MAR 15 1915

F. D. Monckton,

Clerk.

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

EDWIN F. MEYER and
EMAR GOLDBERG,
Plaintiffs in Error,

vs.

THE UNITED STATES OF
AMERICA,
Defendant in Error.

No. 2413.

PETITION FOR REHEARING

To the HONORABLE THE JUSTICES OF THE
UNITED STATES CIRCUIT COURT OF
APPEALS, FOR THE NINTH CIRCUIT:

The petitioner respectfully requests a rehearing
of the above-entitled action.

It is respectfully urged that the Court has failed
to pass upon the point raised that the lower Court

committed prejudicial error in admitting as evidence of unreasonable profits, various sales of other kinds and descriptions of zinc to other purchasers.

With respect to this point, this Court says:

“This was an attempt to prove values by the market, which is always admissible. Zinc was being sold on the market in and around Seattle and elsewhere, constantly, and the sole purpose of the testimony was to show what that market value was. We find no error in the ruling of the Court.”

The difficulty is, the Court has failed to appreciate the fact that to prove this market value, the Government offered in evidence *sales of zinc of various kinds and descriptions, substantially varying from the kinds and sizes of zinc sold to the Government in the transaction in question.*

In our reply brief, at page 21, we were careful to compile an analysis of Mr. House's testimony, showing the dates, amounts, prices, descriptions and purchases of various zines sold by the Corder Company or the Great Western Smelting and Refining Company, or other sellers, and showing these sales did not take place under the conditions or under the circumstances as the sale of the zinc in question.

We again invite the Court's attention to this table appearing on page 22 of our reply brief.

We shall not here repeat the cases in support of the proposition that evidence of values is inadmissible, unless the sales are of similar articles, under similar conditions and under similar circumstances.

It is submitted in this behalf that the Court in its opinion erred in deciding that in a criminal action, involving the liberty of the defendant, market values could be established by showing transactions preceding the transactions in controversy, where the record clearly shows not only entirely *dissimilar conditions*, but also where the record shows that the transactions were in goods of a *different quality and quantity*. It is not urged that the testimony introduced was improperly offered. It is admitted that if such testimony is not incompetent, irrelevant and immaterial, then it was properly proven,—that is to say, no point is made as to the manner of the proof. The Court's attention is solely directed to the evidence itself.

The indictment charged with respect to sales of zinc, that the object of the conspiracy was that the "United States should purchase zinc rolled sheets and boiler plates at a price greatly in excess of its real value, and the conspirators should obtain unreasonable profits," etc. In support of this contention, the Government offered in evidence sales of various zincs of **VARIOUS KINDS AND DESCRIPTIONS, VARYING ENTIRELY FROM THE KINDS AND SIZES OF ZINC SOLD TO THE GOVERNMENT**, in the transaction in question.

It further appeared from the evidence that supplies to the Navy Yard had to be shipped in a peculiar manner, and that great speed was necessary in obtaining this zinc. It is further shown that

there was no zinc of the kind or character on the Pacific Coast at the time, and that the great fleet of the United States was about to arrive at Seattle and would require great quantities of zinc. Not only did the Government fail to establish or prove that the market prices introduced in evidence, were established under conditions similar to the sale of zinc alleged in the indictment, but the defendants proved that said sales took place under totally dissimilar conditions, and under entirely different circumstances, and were of entirely different articles.

It is to be observed that in all the cases permitting the proof of value by the market alone, this proof is permitted under conditions that are reasonably similar, and of goods of the same kind and character.

But it is further contended here that the transactions not only occurred under dissimilar circumstances, but that the articles in the transactions were totally dissimilar in kind and character. The table hereinbefore referred to clearly shows that the market price of zines of an entirely different kind and character were introduced in evidence tending to establish the market value of the zinc in controversy. This can hardly be said to come within the purview of the rule announced by this Court allowing proof of market value by other transactions of a similar character.

We again invite the Court's attention to the case of *Schradsky v. Stimson*, 76 Fed. 730:

“Touching this latter ruling it is only necessary to say that the opinion expressed by the witness concerning the reasonable rental value of the premises occupied by the defendant was based on the fact that they were located in a sightly building, at the junction of two streets (Fifteenth and Larimer), on both of which streets there were street-car lines; also, on the further facts that the building fronted on both streets, and was provided with steam heat, and was for these reasons a very eligible business location. No evidence was elicited from the witness, or attempted to be elicited, that the rent that had been charged for stores Nos. 1445, 1449 and 1451, on Larimer street, was a reasonable rental, or that the building in which the stores were located, and the surroundings thereof, were of such character as to render it probable that the rent charged and collected for such stores was a fair criterion by which to determine the reasonable rental value of the premises in controversy. IT IS A WELL KNOWN FACT THAT MANY CIRCUMSTANCES MAY, AND OFTEN DO, AFFECT THE RENTAL VALUE OF BUILDINGS LOCATED IN LARGE CITIES, AND THAT IT FREQUENTLY HAPPENS THAT PREMISES OF THE SAME SIZE COMMAND A DIFFERENT RENTAL, ALTHOUGH THEY ARE LOCATED IN THE SAME NEIGHBORHOOD AND FRONT ON THE SAME STREET. WE THINK, THEREFORE, THAT THE TESTIMONY SOUGHT TO BE ELICITED FROM THIS WITNESS BY THE AFORESAID QUESTION WAS PROPERLY EXCLUDED. IT HAS NO NECESSARY TENDENCY TO ESTABLISH THE REASONABLE REN-

TAL VALUE OF THE PREMISES IN CONTROVERSY, AND MIGHT HAVE BEEN VERY MISLEADING, UNLESS FURTHER EVIDENCE WAS PRODUCED, WHICH WAS NOT OFFERED, SHOWING THAT THE SITUATION OF THE RESPECTIVE PROPERTIES WAS SUCH THAT THE RENT PAID FOR ONE WAS A FAIR RENTAL FOR THE OTHER. MOREOVER, THE TESTIMONY WAS OBJECTIONABLE ON THE FURTHER GROUND THAT IT HAD A MARKED TENDENCY TO BURDEN THE CASE WITH COLLATERAL ISSUES; FOR, BEYOND ALL QUESTION, IF IT HAD BEEN ADMITTED, THE PLAINTIFF WOULD HAVE BEEN ENTITLED TO SHOW WHAT WAS THE REASONABLE RENTAL VALUE OF THE PROPERTY REFERRED TO BY THE WITNESS, BETWEEN WHICH AND THE PROPERTY IN CONTROVERSY IT WAS PROPOSED TO INSTITUTE A COMPARISON."

In the case of *In re Thompson*, 28 N. E. 390, before the Court of Appeals of New York, Justice Parker, delivering the opinion of the Court, said:

"BUT A PARTY MAY NOT ESTABLISH THE VALUE OF HIS LAND BY SHOWING WHAT WAS PAID FOR ANOTHER PARCEL SIMILARLY SITUATED, BECAUSE IT OPERATES TO GIVE TO THE AGREEMENT OF THE GRANTOR AND GRANTEE THE EFFECT OF EVIDENCE BY THEM THAT THE CONSIDERATION FOR THE CONVEYANCE WAS THE MARKET VALUE, WITHOUT GIVING TO THE

OPPOSITE PARTY THE BENEFIT OF CROSS-EXAMINATION TO SHOW THAT ONE OR BOTH WERE MISTAKEN. IF SOME EVIDENCE OF VALUE, THEN *PRIMA FACIE* A CASE MAY BE MADE OUT, SO FAR AS THE QUESTION OF DAMAGES IS CONCERNED, BY PROOF OF A SINGLE SALE, AND THUS THE AGREEMENT OF THE PARTIES WHICH MAY HAVE BEEN THE RESULT OF NECESSITY OR CAPRICE WOULD BE EVIDENCE OF THE MARKET VALUE OF LAND SIMILARLY SITUATED, AND BECOME A STANDARD BY WHICH TO MEASURE THE VALUE OF LAND IN CONTROVERSY. THIS WOULD LEAD TO AN ATTEMPT BY THE OPPOSING PARTY TO SHOW,—FIRST, THE DIS-SIMILARITY OF THE TWO PARCELS OF LAND; AND, SECOND, THE CIRCUMSTANCES SURROUNDING THE PARTIES WHICH INDUCED THE CONVEYANCE,—SUCH AS A SALE BY ONE IN DANGER OF INSOLVENCY, IN ORDER TO REALIZE MONEY TO SUPPORT HIS BUSINESS, OR A SALE IN ANY OTHER EMERGENCY WHICH FORBIDS A GRANTOR TO WAIT A REASONABLE TIME FOR THE PUBLIC TO BE INFORMED OF THE FACT THAT HIS PROPERTY IS IN THE MARKET; OR, ON THE OTHER HAND, THAT THE PRICE PAID WAS EXCESSIVE, AND OCCASIONED BY THE FACT THAT THE GRANTEE WAS NOT A RESIDENT OF THE LOCALITY, NOR ACQUAINTED WITH REAL VALUES, AND WAS THUS READILY INDUCED TO PAY A SUM FAR

EXCEEDING THE MARKET VALUE. Thus each transaction in real estate claimed to be similarly situated might present two side issues, which could be made the subject of as vigorous contention as the main issue, and, if the transactions were numerous, it would result in unduly prolonging the trial, and unnecessarily confusing the issues, with the added disadvantage of rendering preparation for trial difficult.

“Our attention has been called to a case in this court where the question has been passed upon in the manner here presented, but there are a number of decisions indicating the tendency of the court to be against proving value by evidence of the selling price of similar property. In *Huntington v. Attrill*, 118 N. Y., 365, 23 N. E. Rep. 544, the defendants attempted to prove the value of certain seaside property by showing the value of other property of the same general character situated in different places, and Judge Bradley, speaking for the court, said: ‘It may be that such evidence would have furnished some guide for estimate of the value of the property, but might not. Such evidence would present collateral issues, which might, and very likely would, involve a variety of considerations having relation to similarity or difference, and to advantages and disadvantages of the different properties in numerous respects, as compared with that in question. It is quite well settled that evidence of that character is not admissible upon the question of the value of property in controversy.’ The question was not necessarily before the court in *Mayor, etc., v. McCarthy*, 102 N. Y. 630-638, 8 N. E. Rep. 85; but Chief Justice Ruger, referring to the question whether the

price paid on sales of real estate between individuals is admissible as evidence of value, said: 'We think it quite clear, however, that such price is not, in any view, competent evidence of value.' In *Blanchard v. Steam-Boat Co.*, 59 N. Y. 292, the defendant attempted to show the value of a sunken steam-boat by proving the value of other steam-boats with which she could be compared, and it was held that the evidence was not competent. In *Langdon v. City of New York*, (Sup. Ct.) 13 N. Y. Supp. 864, the objection was that other evidence should be produced to establish the fact sought to be proven (page 866) so that the question of the relevancy of the evidence was not before the court. We are of the opinion that the value of property which depends upon the presence or absence of inherent qualities not necessarily present or absent in other and similar property cannot be proved by showing the price paid for such other and similar property. The value of property having a recognized market value, such as No. 1 wheat and corn, may, of course, be proven by showing the market prices; BUT THE VALUE OF PROPERTY WHICH IS DEPENDENT UPON LOCALITY, ADAPTABILITY FOR A PARTICULAR USE, AS WELL AS THE USE MADE OF PROPERTY IMMEDIATELY ADJOINING, MAY NOT BE SHOWN BY THE EVIDENCE OF THE PRICE PAID FOR SIMILAR PROPERTY. Even under the Massachusetts rule, a reversal would not be justified because of the extent of the discretion vested in the judge or officer presiding at the trial to determine whether such evidence is admissible, depending, of course, on various elements, such as the nearness or remoteness of the time of sale; whether the premises are far sep-

arated; the condition of the property about the parcel sold, and the use made of it, which may have operated to enhance or diminish its selling value; the similarity of the property not only as to description, but as to its availability for use. *Chandler v. Jamaica Pond Aqueduct Corp.*, 122 Mass. 305; *Gardner v. Brookline*, 127 Mass. 358-363, and cases cited."

In considering the application of the Statute of Limitations to the Overt Acts set forth in the indictment, the Court said:

"Our firm conviction is that public funds are not appropriated or converted while there is opportunity on the part of the Government to prevent such appropriation, and in this case it was still within the power of the Government to stop payment of this check, at least until credit was given for it by the bank of deposit of public funds against which Orr was authorized to check, or it was paid by the National Treasury."

No issue is taken by plaintiff in error with the Court as to the rules of law applicable to the questions at issue. Issue is solely taken as to the application of these rules to the facts. The Court in its opinion seems to indicate the mere fact that the government could have at any time stopped the payment of the check, is sufficient to remove the bar of the Statute of Limitations.

Without going into a detailed analysis of the indictment (see plaintiff in error's opening brief), we invite the Court's attention to the fact that in coming to a conclusion as to what was the last ultimate Overt

Act, the entire indictment must be taken into consideration. It must be construed in its entirety and scrutinized in all its allegations, so that in view of the objects of the conspiracy it may judge what the Overt Acts necessary to effectuate the object of the conspiracy really are. Without further analysis, it would seem to the plaintiffs in error that the ultimate object of the conspiracy was the defrauding of the government and the obtaining of the check. As to the obtaining of the check, there can be no doubt but that any Overt Act to effectuate this object was barred by the Statutes of Limitations, so the sole remaining question is as to when the government was defrauded. The mere fact and this is the point we desire to particularly emphasize, that the government having been once defrauded the result thereof continuing on forever does not constitute an Overt Act. The Court has looked in its opinion merely to the physical aspects of the transactions wherein a debt is paid by a check. A man may pay a merchant a debt due him by a check and that check may pass through forty hands, yet would this Court hold that if this check had been obtained by the merchant under false pretences there would be no defrauding by the merchant the moment the check had been obtained from the debtor although the withdrawal of the funds from the account of the debtor in the bank did not take place till many days subsequent. The mere fact that the government might have a defense to the payment of this check does not in itself mean that the government was not defrauded at the moment

the check was given. The moment the government was defrauded the conspiracy was consummated and it is contended that the moment the check was delivered as a good and valid obligation of the government, the government was defrauded and the government having been defrauded at this moment the object of the conspiracy was ended and all subsequent steps of any kind and character were merely the results of a pre-existing conspiracy.

The charge against the defendant, Emar Goldberg, is, to our minds, absolutely without foundation, and shown to be such. What purpose could Emar Goldberg, an employee, under a salary, have had in entering into the conspiracy referred to in the indictment? He could not have been the gainer thereby. He had no interest in the profits of the Great Western Smelting and Refining Company; he was a mere employee. That he was the victim of a black-mailing scheme is absolutely plain. The business of his employer was threatened with extermination by Kettlewell unless he allowed Kettlewell money. He complained to Mr. James A. Kerr, a prominent member of the Seattle bar, of Kettlewell's importunities.

Kettlewell himself, admitted his own infamy, and that he had a scheme to compete with honest merchants in their business relations with the Government. He sold goods to the Government under various fictitious names, and made large profits thereby. It was with this kind of a man that Goldberg (the employee) was thrown in contact. This man Kettlewell, was put in a responsible position by the

Governmental authorities, and he used this position as a club.

It is respectfully submitted that a rehearing should be granted in this case.

Kerr + Mc Cord
Bert Schlesinger
Morris + Shipley.
A. R. Black.

Attorneys for Plaintiffs in Error.

IN THE
United States
Circuit Court
of Appeals

FOR THE NINTH CIRCUIT.

IN THE MATTER
OF

The Application of JOHN DENNETT, JR., ET AL., for a Writ of Mandamus, directed to the HONORABLE WILLIAM H. SAWTELLE, District Judge of the UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA, and directed to said District Court.

Motion for Leave to file Petition for Writ of Mandamus and for an Order to Show Cause.

WILLIAM M. SEABURY,
Attorney for Petitioners,
Fleming Building,
Phoenix, Arizona.

1

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT.

IN THE MATTER OF

The Application of JOHN DENNETT, JR.,
J. G. BOGARD, J. J. KEATING, ROSE
BOEHMER, MARY BLEAK, HARRY E.
HARTER, H. S. GRAY, MARY E. ELLS-
WORTH, L. M. GUSTAFSON, A. H. FER-
RIN, LUCY H. PURDUM, H. P. WIGHT-
MAN, A. C. LOCWOOD, ALEX. ANDER-
SON, D. BOHN, ERIT EQUIST, A. H.
OELTJEN, GEORGE S. HUGHES, MRS.
W. J. JACSON, LYSANDER CASSIDY,
RAMON BRENNNA, ROSS H. BLAKELY,
JOHN W. HARRIS, JR., A. C. MARCOM,
FRED W. ALBRIGHT, M. KIRSHWING,
OLAF OLSEN, THEO. HOLTEN and
OLE HOLTEN, HUGO SANDQUIST,
EUGENE SEELEY, JAMES H. EAST,
FRED CADWELL, MARGARET CAD-
WELL, E. B. TINKER, E. L. HOSLER,
S. L. HOSLER, GLENN W. MORSE, B.
G. TANG FONG, A. E. GILLARD, J. C.
WILHELM, FRANK A. MOSS, GEO. K.
ANDERSON, L. D. LACHANCE, GRACE
LANGSTON, FRANK A. FLICKENGER,
CHARLES J. PATTERSON, E. T.
STAEBLER, NETTIE SHELDON, LLOYD
C. HENNING, WILSON PATTERSON, E.
W. CLAYTON, WILLIAM C. FAULKNER,
WALTER W. WILLIAMS, J. N. STRAT-
TON, W. E. PLATT, JOHN F. WEBER,
S. G. IJAMS, IDA N. FRYE, WILLIAM
SOBEY, WILLIAM WHALLEY, O. W.
MILLER, WILLIAM H. WATTS, GLOBE
LUMBER COMPANY, ALFRED HAN-
SEN, CLARA F. BLOOM, nee CLARA
FERRIN, ORVILLE YOUNG, FRED W.
HORN, J. C. BRADLEY, OLIVER MYERS,
J. W. McLEAN, JOSEPH CARPENTER,
JOHN STEIGLER, C. R. FREEMAN, M.
A. RAMERIZ, E. J. BRUNENKANT, C.
BRUNENKANT, THOMAS WEEDIN,
FREDERICK E. WHITE, FREDERICK
E. WHITE, Assignee of AH LEE, SAM
Y. BARKLEY, M. D. LANGLEY, MRS.
J. N. RUSSELL, CORA E. DUNAGAN,
HELEN WEBER, W. E. YOUNG, MRS.
M. L. GRAVES, MRS. W. S. HURST,
MRS. C. S. BROWN, MARIA B.
STEVENS, A. T. KLEINSCHMIDT,
ROSARIO C. BRENA, A. J. DURAGO,
H. CAPIN, L. C. FREDERICO and E. T.
COLLINS, for a Writ of Mandamus di-
rected to the Honorable WILLIAM H.
SAWTELLE, District Judge of the
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA, and
directed to said District Court.

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- 4 Now come the petitioners above named, and each of them, by William M. Seabury, their solicitor, and move for leave to file the petition hereto annexed for a writ of mandamus, and further move that an order be entered and issued directing the Honorable William H. Sawtelle, District Judge of the United States for the District of Arizona, and directing the District Court of the United States for the District of Arizona to show cause, if any there be, why a writ of mandamus should not issue against said judge and court and each of them, in accordance with the prayer of said petition and why said petitioners should not have such other and further relief in the premises
- 5 as may be just and proper.

WILLIAM M. SEABURY,
Attorney for Petitioners,
Fleming Building,
Phoenix, Arizona.

Dated, Phoenix, Arizona,
May 4th, 1914.

TO THE HONORABLE JUDGES OF THE UNITED
STATES CIRCUIT COURT OF APPEALS FOR THE
NINTH CIRCUIT:

- John Dennett, Jr., J. G. Bogard, J. J. Keating,
6 Rose Boehmer, Mark Bleak, Harry E. Harter,
H. S. Gray, Mary E. Ellsworth, L. M. Gustafson,
A. H. Ferrin, Lucy H. Purdum, H. P. Wightman,
A. C. Lockwood, Alex. Anderson, D. Bohn,
Erit Equist, A. H. Oeltjen, George S. Hughes,
Mrs. W. J. Jackson, Lysander Cassidy, Ramon
Brenna, Ross H. Blakely, John W. Harris, Jr.,
A. C. Morcum, Fred W. Albright, M. Kirshwing,
Alaf Olsen, Theo. Holten and Ole Holten, Hugo
Sandquist, Eugene Seeley, James H. East, Fred
Cadwell, Margaret Cadwell, E. B. Tinker, E. L.

Hosler, S. L. Hosler, Glenn W. Morse, B. G. 7
 Tank Fong, A. E. Gillard, J. C. Wilhelm, Frank
 A. Moss, Geo. K. Anderson, L. D. La Chance,
 Grace Langston, Frank A. Flickenger, Charles
 J. Patterson, E. T. Staebler, Nettie Sheldon,
 Lloyd C. Henning, Wilson Patterson, E. W.
 Clayton, William C. Faulkner, Walter W. Wil-
 liams, J. N. Stratton, W. E. Platt, John F. Weber,
 S. G. Ijams, Ida N. Frye, William Sobey, William
 Whalley, O. W. Miller, William H. Watts, Globe
 Lumber Company, Alfred Hansen, Clara F.
 Bloom, nee Clara Ferrin, Orville Young, Fred
 W. Horn, J. C. Bradley, Oliver Myers, J. W.
 McLean, Joseph Carpenter, John Steigler, C. R.
 Freeman, M. A. Ramirez, E. J. Brunenkant, C. 8
 Brunenkant, Thomas Weedin, Frederick E.
 White, Frederick E. White, assignee of Ah Lee,
 Sam Y. Barkley, M. D. Langley, Mrs. J. N. Rus-
 sell, Cora E. Dunagan, Helen Weber, W. E.
 Young, Mrs. M. L. Graves, Mrs. W. S. Hurst,
 Mrs. C. S. Brown, Maria B. Stevens, A. T.
 Klienschmidt, Rosario A. Brena, A. J. Durago,
 H. Capin, L. C. Frederico and E. T. Collins, the
 petitioners herein, respectfully allege:

I.

That heretofore and on or about July 15, 1912,
 one Charles W. Clark, as complainant, filed a bill 9
 on the equity side of the District Court of the
 United States for the District of Arizona, against
 the Arizona Mutual Savings and Loan Associa-
 tion and the Arizona Trust Company, in his own
 behalf as a stockholder in the defendant Loan
 Association, and on behalf of other stockholders
 in said Loan Association similarly situated.

2.

The complainant Clark was a citizen of the

- 10 State of California and both defendants were corporate citizens of the State of Arizona and the sole ground of Federal jurisdiction was the existence of the diversity of citizenship last specified and a controversy involving more than the amount requisite to vest jurisdiction in a District Court of the United States.

3.

A copy of said bill of complaint is hereto annexed, made a part hereof and marked "Exhibit 1."

11

4.

- It appears from the exhibits hereto annexed that in April, 1911, defendant Loan Association had become insolvent and that the officers thereof and those in control of its affairs had caused to be organized the defendant Arizona Trust Company, and had thereafter unlawfully transferred to the Trust Company all of the assets of the Loan Association, then alleged to amount to about one hundred and thirty thousand dollars in value, but that thereafter approximately 90% of all of the stockholders of the Loan Association voluntarily exchanged their stock in the Loan Association for stock in said Trust Company.

5.

The complainant Clark refused to exchange his stock in the defendant Loan Association for stock in the defendant Trust Company and brought his action as a stockholder in the defendant Loan Association for himself and others similarly situated primarily to have the transfer of the Loan Association's assets to the Trust Company annulled, to compel the restoration of the property

to the Loan Association and to wind up the affairs of the Loan Association and, since the Loan Association had no creditors other than its stockholders, to distribute its assets to its stockholders. 13

6.

After the bill was filed and process duly served upon the defendants, your petitioners, at various times between July 15, 1912, and February 27, 1913, during the progress of said cause filed their intervening petitions in said cause, as appears from copies of the said petitions which are hereto annexed, made a part hereof and marked respectively "Exhibit 2," "Exhibit 3," "Exhibit 4" and "Exhibit 5." 14

7.

It appears from said petitions that some of your petitioners hereinafter described for convenience as non-exchanging stockholders, were, like the complainant in said cause, stockholders in the defendant Loan Association, but had never exchanged their stock therein for stock in the defendant Trust Company, while others of your petitioners named in said intervening petitions and hereinafter described as exchanging stockholders, had exchanged their stock in the defendant Loan Association for stock in the defendant Trust Company, and consequently from the time of said exchange ceased to be and were not then stockholders in the defendant Loan Association. 15

8.

Your petitioners who were exchanging stockholders alleged with particular reference to themselves that they had been induced to exchange

16 their said stock by actionable misrepresentations made to them by the defendants in said cause, and for that reason such exchanging interveners sought a rescission of the exchange of stock and a restoration to their original status as Loan Association stockholders, and as such Loan Association stockholders prayed to join with the complainant in seeking the relief which said complainant sought.

9.

In due course, the defendants appeared and answered the complainants' bill jointly, a copy of
 17 which answer is hereto annexed, made a part hereof, and marked "Exhibit 6." And your petitioners filed a replication to said answer, a copy of which replication is hereto annexed, made a part hereof and marked "Exhibit 7."

10.

On February 27, 1913, said day being within the October, 1912, term of said court, the cause regularly came on to be heard and was duly tried, the evidence and witnesses being heard in open court before the Honorable Richard E. Sloan, then District Judge for the District of Arizona,
 18 the parties to said cause appearing by their respective solicitors.

11.

The trial of said cause resulted in a final decree which was duly entered and enrolled as of the 27th day of February, 1913, copy of which is hereto annexed, made a part hereof and marked "Exhibit 8."

By the said decree of February 27, 1913, the court found that twenty-one of your petitioners were non-exchanging stockholders in the defendant Loan Association and had paid in to said Association the sums set opposite their respective names in said decree, which sums aggregate \$7,349.78, and that seventy-four of your petitioners had paid in to said Association and to said Trust Company, or both, the sums set opposite their respective names in said decree, which sums aggregated \$27,096.93.

The court found the insolvency of the defendant Loan Association and adjudged as to the complaining interveners, your petitioners herein, and other non-consenting stockholders in the defendant Association who had never transferred their stock therein for stock in the defendant Trust Company, that the transaction complained of was "unlawful and invalid and not binding upon the interveners herein or upon the other outstanding and non-exchanging stockholders in the defendant Loan Association."

The court found further that the transfer of the assets of the Loan Association to the Trust Company had so far been consummated and completed that the Trust Company officers had dealt with the assets and properties as though owned by the Trust Company and confused and inextricably mingled the assets of the Loan Association with the assets of the defendant Trust Company, and that at that time it was impracticable and impossible in justice to the parties to direct and

- 22 enforce a re-transfer of all of the original properties and assets so derived by the Trust Company and the profits thereon, to the defendant Loan Association.

15.

- The court found that your petitioners who were exchanging stockholders had been induced to make the exchange by the misrepresentations alleged and as to such of your petitioners decreed a rescission as to such exchange and restored such of your petitioners to their status as stockholders in the defendant Loan Association and to the end
- 23 that the rights of all of the interveners then before the court and all the outstanding stockholders in the defendant Loan Association who had never exchanged their stock therein for stock in the Trust Company might be adequately preserved, protected and treated with equality, the court confirmed the sale and transfer of all the assets of the Loan Association to the defendant Trust Company and adjudged complete title thereto to be vested in the defendant Trust Company, subject nevertheless to a lien, charge and trust for the amounts set forth in said decree, in favor of the interveners then before the court and the other stockholders in the defendant Loan
- 24 Association, specified in Paragraph 8 of the said decree, who did not appear in the cause by counsel, but whose rights were similarly protected nevertheless and who constituted the only stockholders in the defendant Loan Association other than your petitioners, which said other stockholders aggregated fifty-nine in number, and \$21,662.22 in amount.

16.

And the court in and by said final decree of

February 27, 1913, among other things, directed 25
 the receiver appointed by said decree, after paying the cost of administering his trust, to pay "pro rata in equal shares to each and all of the interveners herein and to the stockholders of the defendant Loan Association named in the eighth paragraph, such sums of money as might be received until the said interveners and the said non-exchanging Loan Association stockholders named in the preceding eighth paragraph, are paid in full the amounts set opposite their respective names herein, and that the said receiver pay the balance remaining thereafter, if any in his hands, to the defendant Trust Company for the benefit of such persons as may be lawfully entitled thereto." And said decree was made by the 26
 learned court in full realization of the fact that all parties injured by the transactions complained of by said Clark and your petitioners were before the court or represented by the Trust Company, as hereinafter shown, in the proceedings relating to the decree of February 27, 1913, except those mentioned in paragraph eight of said decree, whose rights were fully protected, and none of whom complained against said decree, but instead accepted its benefits.

17.

The term of court at which said decree was 27
 entered expired on April 5, 1913. On that day, but after the adjournment of the court for said term, Benton Dick, Esq., as solicitor for a large number of persons, filed a motion to intervene and an intervening petition in said cause, a copy of which is hereto annexed, made a part hereof and marked "Exhibit 9." And as appears from an inspection of Exhibit 2 hereof, many persons named in said Exhibit 9 as proposed interveners in said cause had already intervened therein

28 through the solicitor of your petitioners herein, but each of the said persons named in Exhibit 2 who also appear in Exhibit 9, voluntarily withdrew from the said proceeding in or about the month of August, 1912, and instructed your petitioners' solicitor to take no further proceedings in their behalf in said cause, as your petitioners are informed and verily believe. But said motion was not continued over the said term or called to the attention of the court until about April 14, 1913, at which time your petitioners' solicitor brought said petition to the attention of the court then presided over by Circuit Judge William W. Morrow, who then and there sustained a demur-
 29 rer to said petition. Thereafter and on or about July 15, 1913, and long after the expiration of the October, 1912, term of said court at which the said final decree of February 27, 1913, was entered, and while said decree stood unappealed from and unreversed, the same solicitor, Benton Dick, Esq., with two other solicitors, filed in the court his motion on behalf on the same persons for whom he had filed the motion and petition on April 5, 1913, and on behalf of the other persons therein named, therein praying to vacate the final decree of February 27, 1913, and for leave to intervene in said cause, a copy of which motion and inter-
 30 vening petition of July 15, 1913, is hereto annexed, made a part hereof and marked "Exhibit 10."

And your petitioners are advised by their counsel, and so allege the fact to be, that the time in which the defendant Trust Company could have appealed from said final decree of February 27th, 1913, did not expire until August 27th, 1913, but that no appeal therefrom was ever prayed, allowed or prosecuted, either by the defendant Trust Company or any one in its behalf, and that in fact said decree conferred more benefits upon

said defendant Trust Company and the interven- 31
 ers named in Exhibits 9 and 10 as preferred
 stockholders therein, than said Trust Company
 or said interveners were strictly entitled to re-
 ceive. By said decree the equities applicable to
 the situation of the parties as disclosed by the
 evidence were considered, fixed and adjudicated,
 and it was adjudged and determined by the court
 after a full hearing that equity and justice would
 be done to all by an award to all parties who were
 still stockholders in the Loan Association of a
 sum of money which fixed the limit of their
 recovery at the sum of their payments to
 said Companies, without interest thereon, and
 decreed a lien upon the properties of both 32
 Companies, to secure the payment thereof. Such
 a course prevented unnecessary hardship to the
 Trust Company, its innocent creditors and its
 stockholders, including all the interveners men-
 tioned in Exhibits 9 and 10 herein, and assured
 to each of said creditors and stockholders in the
 defendant Trust Company the utmost to which
 they were entitled and enabled said Trust Com-
 pany to continue as a going concern and to en-
 deavor to extricate itself from its difficulties.
 And your petitioners allege that the said de-
 cree of February 27th, 1913, was and is res
 adjudicata upon all of the matters therein
 determined as to the said defendant Trust Com- 33
 pany and the defendant Loan Association, and
 upon all persons claiming from, through or under
 said defendants or either of them, and particu-
 larly upon the interveners named in Exhibits 9
 and 10, hereto annexed.

18.

On or about August 26, 1913, Honorable
 William H. Sawtelle, the respondent herein, qual-
 ified as judge of the District Court of the United

- 34 States for the District of Arizona, and thereafter and on or about September 18, 1913, the said motion and petition, filed by the said Benton Dick, Esq., on July 15, 1913, was brought to the attention of said court presided over by the said Honorable William H. Sawtelle, and argument thereon was heard at length from time to time until the decision thereof on March 12, 1914.

19.

- Your petitioners, through their solicitor, opposed the granting of the said motion, particularly upon the ground that the court was without
 35 jurisdiction to vacate, change or modify in any material respect, the said final decree of February 27, 1913, in substance, for the reason and upon the ground that the term at which the said decree was entered and enrolled had long since expired when the said motion was made and that the said decree had been rendered by a competent court having jurisdiction both of the persons and of the subject matter involved therein, and that said decree was in no sense void, but was a valid, just and equitable exercise of lawful authority by the said court as constituted on February 27, 1913, and that the court as constituted on and
 36 after July 15, 1913, was wholly without right, power, authority or jurisdiction to sit as a court of review to revise for alleged errors of fact or law, or to vacate, change or modify the final decree of the same court duly rendered at a preceding term thereof, but notwithstanding the protest of your said petitioners, and without taking any evidence or proof of any of the facts alleged in Exhibit 10 hereto annexed, the said Honorable William H. Sawtelle, as judge of the said court and the said District Court of the United States for the District of Arizona, on March 12, 1914, assumed and purported to vacate

and modify the said final decree of February 27, 1913, and caused to be entered in the place thereof what purports to be another and entirely different decree, copy of which is hereto annexed, made a part hereof and marked "Exhibit 11," and to the making and entry of said decree your petitioners then and there excepted. 37

20.

Immediately after the entry of the said final decree of February 27, 1913, referred to herein as Exhibit 8, the receiver therein appointed, proceeded with the performance of his duties as therein defined, and reduced to possession and to cash a large quantity of the assets of the defendant Trust Company and in or about the month of June, 1913, declared and paid to each of the persons named in the said final decree of February 27, 1913, a ten per cent dividend and in other respects proceeded to carry out and to fulfill the instructions contained in said final decree of February 27, 1913. 38

21.

On or about July 12, 1913, and before the said Benton Dick, Esq., filed his motion and intervening petition of July 15, 1913, referred to herein as Exhibit 10, the Farmers & Merchants Bank, a corporation formerly conducting a banking business in Phoenix, Arizona, recovered a judgment in the Superior Court of Arizona, in and for the County of Maricopa, in the City of Phoenix, against the defendant Arizona Trust Company for the sum of \$18,500.00, with interest thereon, and thereafter, and on or about July 29, 1913, an intervening petition of the said Farmers & Merchants Bank, in the nature of a general creditor's bill, was filed in the said District Court of the 39

- 40 United States, for the District of Arizona, in the said cause of Clark vs. the Arizona Mutual Savings and Loan Association and the Arizona Trust Company, and a motion made by said Farmers & Merchants Bank to extend the receivership of the said Trust Company to its said judgment and for the appointment of a master to take proof of claims against said Trust Company and to marshal and distribute all of the assets of the Trust Company, including the surplus moneys remaining after the terms of the decree of February 27, 1913, had been performed to its creditors and those lawfully entitled thereto, but on or about March 12, 1914, the said District Court for the
- 41 District of Arizona and the Honorable Judge thereof denied the motion and application of the said Farmers & Merchants Bank, and dismissed the said petition of said bank.

- Your petitioners further allege that upon the entry of the said final decree of February 27, 1913, referred to herein as Exhibit 8, your petitioners and all of the stockholders of the defendant Loan Association acquired a vested property right of, in and to all of the assets of the said defendant Loan Association and of the said defendant Trust Company, for the purpose of paying, satisfying and discharging the respective claims of said parties as stockholders of said de-
- 42 defendant Loan Association for the amounts which each of said persons had paid in to one or both of said companies and that the practical effect of the pretended order and decree entered herein on March 12, 1914, and described as Exhibit 11, if given force and effect and recognized as a valid exercise of authority by the said District Court for the District of Arizona and the Honorable Judge thereof, is to deprive your said petitioners and others similarly situated of the vested property rights acquired by them in and to the assets of said companies under and pursu-

ant to the terms of the said final decree of Feb- 43
 ruary 27, 1913, and moreover that the effect
 thereof is to give to the interveners represented
 by the said Benton Dick, Esq., and described in
 Exhibits 9 and 10 herein, the right to participate
 with your petitioners herein as stockholders in
 the defendant Loan Association notwithstanding
 the fact that said interveners are no longer and
 have not been for a long period of time, to-wit,
 since about the year 1911, stockholders in the
 Loan Association, but for a long period of time,
 to-wit, since about May, 1911, have been and now
 are preferred stockholders in the defendant Trust
 Company, all of whose claims, rights and interests
 were duly and properly represented before the 44
 District Court of the United States in the said
 cause of Clark vs. the Arizona Mutual Savings
 and Loan Association, and the Arizona Trust
 Company, by and through the defendant Arizona
 Trust Company, in which the said persons then
 were and still are preferred stockholders, and that
 their rights as stockholders therein were ade-
 quately and equitably protected by the court in
 and by the said decree of February 27, 1913, and
 that the said stockholders in the defendant Trust
 Company have each and all been guilty of laches
 and unreasonable delay in the presentation and
 assertion of their present claim to be entitled like
 your petitioners herein to rescind the exchange 45
 of their stock in the Loan Association which they
 made for stock in the defendant Trust Company.
 And your petitioners herein verily believe that
 after full knowledge of the pendency of the said
 cause and of the fact that their rights as preferred
 stockholders in the defendant Trust Company
 were necessarily involved therein, the said inter-
 veners named in said Exhibits 9 and 10 hereto
 annexed, speculated upon the result of said cause
 and the benefits which they would derive there-
 from as preferred stockholders in the defendant

- 46 Trust Company until long after the entry of said final decree, when said interveners learned of the recovery of one or more judgments against the defendant Trust Company for substantial amounts, which would in the ordinary course of events naturally have priority in the distribution of the assets of the said Trust Company over and above the said interveners as preferred stockholders in said Trust Company. And your petitioners allege that they are advised and verily believe that, among other things, the practical effect of the decree of March 12, 1914, referred to herein as Exhibit 11, if given effect and recognized herein as a valid order of the said District
- 47 Court of the United States for the District of Arizona, will be to establish an entirely novel but illegal method of enabling ordinary preferred stockholders of an insolvent institution, i.e., the defendant Trust Company, to obtain a priority in the distribution of the assets of the defendant Trust Company over and above the lawful judgment creditors of the said defendant Trust Company. And your petitioners allege that the further effect of said decree will be to place said persons who have no right, title or interest in any of the assets or properties of the defendant Loan Association upon an equal footing as participants therein with your petitioners who,
- 48 as the result of their diligence in the prosecution of said cause, acquired their vested property rights, as herein disclosed and set forth in the final decree of February 27, 1913, all of which your petitioners respectfully allege, will result in great damage and irreparable loss to your said petitioners and each of them.

And your petitioners further say that the further effect of recognizing as valid the said decree of March 12, 1914, described herein as Exhibit 11, will be to extend indefinitely and for a period covering several years the settlement

and distribution of the insolvent estate of the 49
 defendant Loan Association now reduced to
 the appraised value of only about \$70,000.00,
 and greatly to enhance and to increase the
 cost of administering said estate and to im-
 pose upon said insolvent estate and the liti-
 gants interested therein a needless burden and
 expense in the administration thereof, and further
 that it was and still is impossible and impracti-
 cable to perform the terms and conditions of the
 said decree of March 12, 1914, for the reasons
 above set forth, and that the said decree of
 March 12, 1914, has unsettled and will unsettle,
 if given validity, property rights of large value
 and in which your petitioners are deeply con- 50
 cerned and interested.

23.

Your petitioners are informed and advised by
 their counsel and verily believe that the said Hon-
 orable William H. Sawtelle, as Judge of the Dis-
 trict Court of the United States for the District of
 Arizona and the said District Court of the United
 States for the District of Arizona, was and is
 wholly without jurisdiction, after the expiration
 of the October, 1912, term of said court, to enter-
 tain the said motion and petition of intervention
 referred to herein as Exhibit 10, and to enter the 51
 said decree of March 12, 1914, referred to herein
 as Exhibit 11, or to enter any order vacating or
 modifying or changing the said final decree of
 February 27, 1913, described herein as Exhibit 8,
 or any other order in said cause affecting your
 said petitioners and their interests as created by
 said final decree of February 27, 1913, and that
 the said Honorable Judge of the said District
 Court and the said Court should be prohibited by
 the writ of this Honorable Court from making or
 entering any order in the premises in any way

52 changing, modifying or vacating the said final decree of February 27, 1913, and that any order which may be made or entered in the premises inconsistent with said final decree should be annulled and expunged from the records of the said court.

24.

And your petitioners are further advised by their counsel and verily believe that they are entitled to the remedy herein sought for the reason that, among other things, it appears upon the face of the record presented to this Honorable Court as a matter of law and not as a disputed matter
 53 of fact that the said Honorable William H. Sawtelle, as District Judge of said Court, and the said Court were wholly without jurisdiction to make and enter the said order of March 12, 1914, and that your petitioners have no other adequate remedy by which to redress the grievances and the extraordinary situation in which your petitioners are placed by the said acts of the said Honorable Judge and the District Court aforesaid. And your petitioners are advised that the said decree of March 12, 1914, referred to herein as Exhibit 11, is not a final decree in such a sense as to render it appealable to, or otherwise reviewable in, the Circuit Court of Appeals.

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25.

On April 13, 1914, your petitioners made a motion in the Supreme Court of the United States for leave to file a petition for a writ of mandamus or prohibition, or both, directed to the court and judge below, because of the matters herein set forth; but on April 20, 1914, the Supreme Court denied without opinion the motion. The petitioners allege that they are advised by their counsel that said application should have been submitted to the Circuit Court of Appeals in and for the Ninth Circuit, instead of to the Supreme Court of the United States.

WHEREFORE, your petitioners and each of them,

respectfully pray that an order or rule be made 55
 and issued by this Honorable Court directing
 the said Honorable William H. Sawtelle as Judge
 of the United States District Court for the Dis-
 trict of Arizona, and directing the said District
 Court to show cause, if any there be, why a writ
 of mandamus should not issue out of this Honor-
 able Court prohibiting said Judge and Court from
 assuming or exercising any jurisdiction over the
 said final decree of February 27, 1913, and com-
 manding the said Judge and the said Court and
 each of them to annul, set aside and expunge
 from the records of said Court the said order or
 decree of March 12, 1914, and to desist and cease
 from exercising jurisdiction in the said cause con- 56
 trary to and in violation of the terms of said final
 decree of February 27, 1913, and that your peti-
 tioners have such other and further writ or relief
 as to this Honorable Court may seem just and
 proper, and your petitioners and each of them, as
 in duty bound, will ever pray.

WILLIAM M. SEABURY,
 Solicitor for Petitioners,
 Fleming Building,
 Phoenix, Arizona.

STATE OF ARIZONA, }
 COUNTY OF MARICOPA. } ss.

John Dennett, Jr., being duly sworn, deposes 57
 and says: That he is one of the petitioners named
 in the foregoing petition; that he has read the
 same and knows the contents thereof. That said
 petition is true of deponent's own knowledge ex-
 cept as to matters therein stated to be alleged on
 information and belief, and as to these matters
 he believes them to be true, and that deponent
 verifies the said petition in his own behalf and on
 behalf of the other petitioners therein named.

JOHN DENNETT, JR.

Sworn to and subscribed before me this 1st
 day of May, 1914.

ARTHUR H. DE RIEMER,
 Notary Public.

My commission expires August 3, 1917.

EXHIBIT I.

IN THE

District Court of the United States
FOR THE DISTRICT OF ARIZONA.

CHARLES W. CLARK,
Complainant,

vs.

ARIZONA MUTUAL SAVINGS
AND LOAN ASSOCIATION,
and the Arizona Trust
Company,

Defendants.

In Equity

No.

59

TO THE HONORABLE JUDGE OF THE DISTRICT
COURT OF THE UNITED STATES, FOR THE DIS-
TRICT OF ARIZONA, SITTING IN EQUITY:

Charles W. Clark, a citizen of the United States and resident in the State of California, brings this, his bill of complaint, against the Arizona Mutual Savings and Loan Association, a corporation duly organized under the laws of the Territory and now existing under the laws of the State of Arizona, and against the Arizona Trust Company, a like corporation, as hereinafter set forth. And thereupon your Orator complains and says:

60

FIRST.—That heretofore, on or about October 23, 1899, the defendant, the Arizona Mutual Savings and Loan Association, hereinafter designated as the Loan Association, was duly organized under the laws of the Territory of Arizona, and now so exists under the laws of the State of Arizona, and that the purposes and objects for which said corporation was incorporated are set forth

in Article II of the Articles of Incorporation 61
thereof, as follows:

“The purposes for which this corporation is organized, and the general nature of the business proposed to be transacted, shall be and is the accumulation and loaning the funds of its members, stockholders and depositors; to receive deposits of money and loan, invest and collect the same with interest, and repay the depositors, with or without interest, and generally to loan money on real estate and other valuable securities, and to receive on deposit the savings of such persons as may desire to deposit them, and to pay interest and dividends on the same as they may accrue, and if deemed desirable to do a general banking business.” 62

That thereafter and about the 11th day of April, 1911, the purposes and objects of the said Loan Association remained unchanged as specified, and that at no time during said period did the said Loan Association assume to do any business other than a loan and savings business, in which the said Loan Association received moneys from its depositors and occasionally loaned certain of said moneys to certain of its stockholders, but that it did not engage in a general banking or other business, and that its purposes and objects were limited exclusively to the said savings and loan business, as aforesaid. That on or about April 11, 1911, an alleged majority vote of the stockholders of the said Loan Association purported to amend the articles of incorporation of said Loan Association so that thereafter Article II of the said Articles of Incorporation read as follows: 63

“The purposes for which this corporation is organized, and the general nature of the business proposed to be transacted, shall be and is the ac-

- 64 cumulation and loaning the funds of its members, stockholders and depositors; to receive deposits of money, loan, invest and collect the same with interest, and repay depositors with or without interest, and generally to loan money on real estate and other valuable securities, and to receive on deposit the savings of such persons as may desire to deposit them, and to pay interest and dividends on the same as they may accrue, and if deemed desirable to do a general banking business; *to buy, negotiate for and exchange and otherwise dispose of stocks, bonds and other securities of other corporations, or of this corporation, and any and all kinds of real and personal property, and to vote*
 65 *upon any shares of stock owned by the corporation."*

That at all times hereinafter mentioned said corporation had and maintained its principal place of business in the City of Phoenix, in the Territory and State of Arizona.

- SECOND.—That the defendant, Arizona Trust Company, is a corporation organized under the laws of the Territory of Arizona and now existing under the laws of the State of Arizona; that said corporation was incorporated on or about March the 21st, 1911, and among other things the nature of the business in which said corporation was
 66 authorized to engage included the right to do a banking business, either commercial or savings, and do to a general trust business, and to sell and issue all, or any part, of its capital stock, or any bonds, debentures or other evidences of indebtedness authorized by its board of directors, in payment for the good will, rights, business, real property, real estate or leases thereon, of any person or corporation, and either as agent or principal to purchase, receive, hold, sell, own and otherwise deal in bonds, mortgages, debentures, notes, shares of capital stock or other securities, obliga-

tions, contracts and evidences of indebtedness of 67
any private, public or municipal corporation
wherever located, and to negotiate, buy, sell and
underwrite the stocks, bonds, securities and assets
of all such corporations as are described therein.

That at all times hereinafter mentioned the said
defendant Trust Company had and maintained,
and still maintains its principal place of business
in the City of Phoenix, in the Territory and State
of Arizona.

THIRD.—That heretofore and prior to April 11,
1911, to-wit, on or about January 1, 1908, your
Orator, the complainant above named, acquired
and became the owner of Certificate No. 2601 68
for one hundred shares of the par value of \$10,-
000, of Class F. Special Investment Stock in the
defendant Loan Association, and that there is
now due upon the books of the said defendant
Loan Association as a balance in favor of the
said complainant on account of moneys heretofore
paid in to said Loan Association on account of
the purchase price of said stock the sum of thirty-
three hundred dollars. That ever since your
Orator became a subscriber to the said one hun-
dred shares of said stock he has fully and in all
things duly performed each and all of the terms
and conditions of the contract of purchase here-
tofore existing between your said Orator and the 69
said defendant Loan Association, and notwith-
standing the matters hereinafter set forth your
said Orator has, on the first day of each and every
month from the 1st day of January, 1908, paid to
the said defendant Loan Association the sum of
sixty dollars, making in all fifty-five monthly pay-
ments on account of the purchase price of said
stock, and making the total payment, as aforesaid,
of the said sum of thirty-three hundred dollars.
That at all times hereinafter mentioned your said
Orator was and now is a citizen of the United

70 States and citizen of and a resident in the State of California, and that the above entitled cause is a suit of a civil nature in equity in which the matter in controversy exceeds, exclusive of interest and costs, the sum or value of three thousand dollars, and is between citizens of different states, to-wit, between your Orator as complainant as a citizen of the State of California, against the defendant corporations, each of which defendants are, as herein stated, a resident and citizen of the State of Arizona.

And your Orator further alleges the fact to be that he was a shareholder in the said defendant Loan Association at the time of the transactions
 71 and each of them of which he complains herein, and that this suit and controversy is not a collusive one to confer upon the court of the United States jurisdiction of a case of which it would not otherwise have cognizance. And, as will more fully appear herein, your Orator alleges that it would be and is futile and useless for him to apply to the officers and directors of the defendant Loan Association for the relief prayed for herein, and that those who at present assume to act as the officers and directors of the defendant Loan Association have openly connived at the fraud and approved of the transactions hereinafter set forth. And,
 72 moreover, that the defendant Arizona Trust Company claims to be the holder and owner of upwards of eighty-five per cent of the capital stock of the defendant Loan Association, and that by reason thereof it would be and is, as more fully appears herein, futile and useless for your said Orator to seek redress for the matters hereinafter set forth at the hands of the majority of the stockholders in said defendant Loan Association.

FOURTH.—That your Orator is one of many of the class of stockholders in said defendant Loan Association who are the holders and owners of

certificates of stock therein, and as such entitled to all the rights, privileges and property as such stockholders in said defendant Loan Association, and that said rights, among other things, include the right of your Orator and other stockholders similarly situated to participate in all of the assets of the said defendant Loan Association, and upon a distribution thereof to receive such, if any, property as may remain undistributed as the property of the said defendant Loan Association, after said defendant Loan Association has discharged all of its obligations to its said stockholders in paying and discharging such stock therein as may have matured and become due and payable from said defendant Loan Association to the members entitled thereto.

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FIFTH.—That on or about the 11th day of April, 1911, the officers and directors of the said defendant Loan Association well knew, and your Orator alleges the fact to be that said defendant Loan Association was then, and the said defendant Loan Association is now, wholly insolvent and unable to meet its accruing obligations as the same matured and became due and payable to its stockholders therein. That thereupon the said officers and directors of the said defendant Loan Association, failing in their duty and obligation as trustees for the benefit of your Orator and other stockholders similarly situated therein, failed and neglected to dissolve the said corporation and to liquidate the obligations thereof, and distribute the assets of the said defendant Loan Association among the stockholders thereof, including your Orator above named, and instead the said officers and directors, *without the knowledge and consent of your Orator, and without the knowledge and consent of many others similarly situated*, entered into a corrupt and fraudulent agreement with certain persons, whose names to

75

- 76 your Orator are at present unknown, whereby it was agreed that a trust company to be known as the Arizona Trust Company, the defendant above named, should be organized for the purpose of taking over the assets and property of the said defendant Loan Association. And thereupon a pretended directors' meeting of the said defendant Loan Association was called and held, and thereafter and on or about the 11th, 12th, 13th and 14th days of April, 1911, respectively, a pretended stockholders' meeting of the said defendant Loan Association was called and held, and it was resolved in and by the said meetings that the said defendant Trust Company, which had then been
- 77 organized to fulfill the purposes herein alleged, would sell to the defendant Loan Association above named, 1300 shares of its capital preferred stock, of the par value of \$100 each, and of the aggregate face value of \$130,000, and that said defendant Loan Association would buy the said stock at the said face value thereof, and in payment thereof would make, execute and deliver to the said defendant Trust Company all of the assets and property, including the good will of the defendant Loan Association above named, and in addition thereto it was agreed by said defendant Loan Association that as part of the consideration for said transaction that the said defendant Loan
- 78 Association would suspend and cease its business and refrain from entering into competition with said defendant Trust Company for a period of two years from the date thereof. And it was further agreed that whereas the said defendant Loan Association would procure the release and termination of a certain contract dated January 10, 1910, made between the defendant Loan Association and one F. L. Blumer, and by Blumer heretofore assigned to and held by one H. D. Underwood, that the said Loan Association would be relieved from all claims and obligations on ac-

count thereof, it was alleged to be deemed desirable and that the best interests of the said Loan Association to make the contract aforesaid. And it was declared further that it was considered that three hundred shares of the common stock of the said Arizona Trust Company is and was a reasonable price for the surrender and termination of said contract, and for all claims of the said Underwood and one A. C. LeBaron against the said defendant Loan Association. 79

SIXTH.—On information and belief your Orator further alleges that in the latter part of April, or at or near the first day of May, 1911, the defendant Arizona Trust Company made, or pretended to make, a delivery to the said defendant Loan Association of the said 1300 shares of preferred stock in said defendant Trust Company, or delivered the said defendant Loan Association the promise and obligation of the said defendant Trust Company to deliver said shares as and when the same might be issued. That thereupon the said defendant Loan Association pretended to sell, assign, transfer and set over to the said defendant, Arizona Trust Company, all of its said assets, property, notes, mortgages and other securities of every kind and character, and the said defendant Trust Company then and there received said assets, which were of the value of upwards of \$130,000, since which time the said defendant Trust Company exclusively has exercised control and dominion over the said assets and securities, and each of them, although, as your Orator is informed and verily believes, the record title to many of the said real estate securities so attempted to be transferred from the said defendant Loan Association to the said defendant Trust Company, still stand in the name of the said defendant Loan Association. And that notwithstanding the matters herein set forth the said 80 81

- 82 defendant Trust Company has ever since April, 1911, dealt with the said securities and properties as though they belonged to the said defendant Trust Company and to certain of the individual officers thereof. But your Orator alleges the fact to be that there was no right, power or authority in the said defendant Loan Association, or a majority of the directors or stockholders thereof, to convey all or any of its assets for the purposes above named, or to place the said defendant Trust Company, or any of its officers, in possession thereof, and that said transfer and all of the said acts herein set forth were made *without the knowledge, consent or acquiescence of your said*
- 83 *Orator and in violation* of his rights as a stockholder in the said defendant Loan Association, and in violation of the obligations of the said defendant Loan Association to your Orator above named, and in violation of the obligation which the said defendant Loan Association owed to all stockholders similarly situated, and in further violation of the contract which then and now exists between your Orator and other stockholders similarly situated and the said defendant Loan Association.

- And your Orator alleges on information and belief that the purpose of said transfer was in
- 84 really a fraudulent scheme improperly to perpetuate the existence of the defendant Loan Association after it had in fact, as heretofore alleged, become and was insolvent, and was in fact unable to perform and discharge its duties and obligations to its said stockholders by reason of the said defendant Loan Association's insolvency, and by reason of the fact that said defendant Loan Association had suspended the operation of its said business and had conveyed, or attempted to convey, among its other assets, its good will to the said defendant Arizona Trust Company, and had in other respects violated, broken and destroyed

its contract with your said Orator above named 85
and other stockholders similarly situated. That
the defendant Trust Company with full know-
ledge of all the facts herein set forth, and with
full knowledge of the fact that in April, 1911, due
to the insolvency of the defendant Loan Associa-
tion, the officers and directors thereof became and
were trustees for the benefit of your Orator and
other stockholders similarly situated, and that the
assets and property of the said defendant Loan
Association were thereupon and thereafter im-
pressed and charged with the trust for the benefit
of your said Orator and other stockholders in said
defendant Loan Association similarly situated,
and notwithstanding the fact that the said de- 86
fendant Loan Association had no other debts or
obligations than those which it owed to your
Orator and other stockholders therein similarly
situated, the said defendant Trust Company, with
full knowledge of all of the matters herein set
forth, took over the said assets and property of
the said defendant Loan Association and pro-
ceeded to and did announce to the stockholders
thereof that the said purchase and sale of the
assets and properties of the said defendant Loan
Association had been and was then completed
and that the said defendant Trust Company had
paid for the assets of the said defendant Loan
Association the purchase price thereof, i. e. the 87
sum of \$130,000 by and with preferred stock of
the said Arizona Trust Company, and that to in-
duce the stockholders of the said defendant Loan
Association to come into and become stockholders
in said defendant Trust Company, the said de-
fendant Trust Company offered to sell or ex-
change other shares of its preferred stock for
shares of the stock held by the individual stock-
holders of the said defendant Loan Association,
and that as your Orator is informed and verily
believes, many of the former stockholders in said

88 defendant Loan Association delivered their certificates of stock in the defendant Loan Association to the said defendant Trust Company and received in the place thereof the promise of the defendant Trust Company to issue as and when paid for other shares of preferred stock in the said defendant Trust Company. But your Orator alleges the fact to be that as the stockholders of the defendant Loan Association surrendered their stock to the said defendant Trust Company the defendant Trust Company, acting in concert and in conspiracy, through its officers and directors and those in charge and control of the defendant Loan Association, depleted and withdrew from
89 the treasury of the defendant Loan Association a proportionate share of the 1300 shares of preferred stock theretofore delivered and transferred by the defendant Trust Company to the defendant Loan Association as the alleged purchase price and consideration for the transfer by the defendant Loan Association of all its assets and property, aggregating \$130,000 in amount, to the said defendant Trust Company.

And your Orator alleges upon information and belief that an examination of the books and assets of the defendant Loan Association made on or about April 12, 1912, by one J. F. Tracy, as Bank Examiner under the direction of the Honorable
90 J. C. Callaghan, Bank Comptroller of the State of Arizona, made as of the close of business on April 9, 1912, disclosed the fact to be that at said date there was then and there outstanding stock of the said defendant Loan Association and the owners of which were to a great number similarly situated as your said Orator, and aggregating in amount about \$43,008.88, which amount represented the alleged book value of the stock of the said stockholders in the said Loan Association as of said day. And in this connection, your Orator is informed and therefore alleges the fact to be that

as pretended security for the performance of the obligations of the defendant Loan Association due to said stockholders there was set apart and segregated from the assets received by the defendant Trust Company from the defendant Loan Association real estate security of the alleged face value of approximately \$43,417.31, but that in fact the said real estate security so pretended to be placed as security for the performance of the defendant Loan Association's obligations to its said outstanding stockholders, as aforesaid, were in reality and now are the property of the defendant Loan Association and not the property of the defendant Trust Company, the officers of which pretended to set apart said assets for the alleged benefit of said stockholders in the defendant Loan Association. And, moreover, that the said sum of securities has been reduced in amount at the present time until as plaintiff is informed and verily believes there remains approximately only \$20,000 to secure the obligations of the defendant Loan Association to such of its stockholders similarly situated with your Orator, who have refused to accept the offer of the defendant Trust Company to purchase its preferred stock in exchange for the surrender of the rights of your Orator and others similarly situated in and to the assets of the defendant Loan Association in which they are stockholders.

And your Orator further alleges the fact to be that there was on April 11, 12, 13 and 14, 1911, and at all times subsequent thereto a close and intimate relationship of trust and confidence existing between the officers of the defendant Trust Company and the officers of the defendant Loan Association, and that it became and was the duty of the officers and directors of the defendant Trust Company in assuming to and in dealing with the assets and properties of the said defendant Loan Association, with full knowledge

94 of each and all of the facts herein set forth, to safeguard and to protect the interests of your Orator above named, and other stockholders in the defendant Loan Association similarly situated. But your Orator is informed and verily believes, and therefore alleges the fact to be, that the officers and directors of both of said defendants, willfully violated their said duties and the said trust and confidence which should have existed between them and Your Orator and other stockholders similarly situated, in that the said officers and directors of the said defendant Trust Company dealt with the said property and securities belonging to the said defendant Loan Association

95 for their own private, selfish ends and purposes and without the slightest benefit to your Orator and other stockholders in the defendant Loan Association similarly situated, and that at the present time the officers and directors of the defendant Trust Company are in control of all of the assets of the defendant Loan Association. And, moreover, said officers and directors of the defendant Trust Company, acting in concert and collusion with those in control of the affairs of the defendant Loan Association, have unlawfully withdrawn and reacquired possession of the consideration and purchase price theretofore paid

96 and agreed to be paid by the defendant Trust Company to the said defendant Loan Association for the transfer of all the property of the said defendant Loan Association to the said defendant Trust Company, i. e. the sum of 1300 shares of the preferred capital stock of the said defendant Trust Company, the face value of which amounts to the sum of \$130,000. And in this connection, upon information and belief, your Orator alleges the fact to be that as a result of the unlawful and fraudulent scheme and purpose heretofore alleged the fact is and your Orator so alleges that at the present time the defendant Arizona Trust Com-

pany, not only has possession and control and pretended ownership of all of the assets and property of the defendant Loan Association, but in addition thereto has regained possession of the entire purchase price thereof, i. e. the said sum of \$130,000 of the face value of preferred stock in said defendant Trust Company. 97

And your Orator further alleges in this connection that it is the purpose of the defendant Trust Company to retire and to cancel all of the said 1300 shares of the par value of \$100 each of the preferred stock of the defendant Trust Company, and by so doing thereby to enhance and to increase in value the common stock of the defendant Trust Company, all to the irreparable damage and injury, not only of the defendant Loan Association, but of your Orator and other stockholders therein similarly situated. 98

And your Orator further alleges upon information and belief that at the time of the organization of the said defendant Trust Company for the purposes aforesaid, it had no assets or property of any kind or character and that at the time the defendant Trust Company entered into the agreement aforesaid with the defendant Loan Association to sell 1300 shares of its preferred stock to the said Loan Association in consideration of the transfer of all of the assets of the said defendant Loan Association to it, the said stock was worthless and had no value of any kind or character, and that the only value, if any, which said stock acquired immediately thereafter was due to the pretended transfer and sale of the assets of the said defendant Loan Association to the said defendant Trust Company as aforesaid. 99

And your Orator further alleges that by reason of the matters herein set forth, all of the assets and property of the defendant Loan Association have been used by the defendant Trust Company in the exploitation of various speculative enter-

- prises, in which said defendant Trust Company has engaged, and that in connection with said enterprises the assets of the defendant Loan Association have been used by the said defendant Trust Company and the officers thereof, and that the said assets have been and have become mingled with certain other assets of the defendant Trust Company subsequently acquired by it, and that by reason thereof your Orator and other stockholders in the said defendant Loan Association have acquired equities and rights in connection with said after acquired property of the said defendant Trust Company, but that it is difficult now to separate and to segregate the assets
- 101 which have at all times belonged to the said defendant Loan Association, and possession of which was acquired by the defendant Trust Company, as aforesaid, from such, if any, assets as have been acquired subsequently by the defendant Trust Company, and that the acts of the officers of the defendant Trust Company in so intermingling and merging the assets of both the said defendants above named, were done and performed with full knowledge of all of the facts herein alleged and was a deliberate and preconceived attempt to secure the assets and property of the defendant Loan Association at the sacrifice of the rights and interests of your Orator and other
- 102 stockholders in said defendant Loan Association similarly situated.

And your Orator further alleges that the said defendant Trust Company is now engaged in using the said assets and property of the defendant Loan Association in which your said Orator and other stockholders therein similarly situated has and have an interest for the purposes and objects wholly beyond the scope of the purposes and objects for which the defendant Loan Association was incorporated, and still exists as a corporate entity, all to the great and lasting

damage and irreparable injury of your Orator 103
above named and others similarly situated.

SEVENTH.—On information and belief your Orator further alleges the fact to be that if the defendant Trust Company be required to return the said \$130,000 worth of assets heretofore received by it to the said defendant Loan Association that then and in that event the defendant Trust Company will be wholly insolvent.

And on information and belief your Orator further alleges that it is impossible to determine the exact rights and equities of your Orator above named and others similarly situated in and to the assets of the defendant Loan Association 104
without a judicial accounting between both of the defendants above named and between your Orator and others similarly situated and the defendant Loan Association, and that the officers and directors of both of said defendants are so intimately and closely associated and connected in the transactions aforesaid that it would be and is utterly useless and futile for your Orator and other stockholders similarly situated to demand that the officers and directors of the defendant Loan Association proceed forthwith to recover each and all of the assets heretofore unjustly appropriated by the defendant Trust Company as herein set forth, for the reason that said action 105
would require the said officers and directors to repudiate their own acts and would require and necessitate the bringing of one or more actions against themselves to compel said officers and directors to account for their official misconduct in connection with the matters herein set forth, and for that reason your Orator brings this bill in equity in his own behalf and in behalf of all others similarly situated, to the end that the transactions herein set forth as heretofore made between the defendants above named be annulled

106 and declared void and held for naught, and to the end that an accounting may be had between the two defendants above named, and between the defendant Loan Association and your Orator and others similarly situated, and to the end that the property and assets of the defendant Loan Association, in which your Orator and others similarly situated has and have respectively an interest, may be conserved and protected, and that a receiver of the defendant Loan Association may be forthwith appointed, with full powers to acquire and take possession of and to marshal the assets of the defendant Loan Association in whosoever hands the said assets and properties
 107 may be, and to ascertain the amounts due and owing from the said defendant Loan Association to your said Orator and other stockholders thereof similarly situated, and that such sums of money, if any, as may be due and owing to the defendant Loan Association be ascertained and determined, and that your Orator and others similarly situated, who may desire to intervene herein in support of this bill of complaint may be permitted so to do, and that your Orator and such persons as may intervene, as aforesaid, may be awarded such other relief as to a court of equity may seem proper.

108 And your Orator further alleges he has not, and that other stockholders of the defendant Loan Association similarly situated, have not, any other adequate remedy by law or otherwise, for the protection and preservation of the property and rights of your Orator and others similarly situated as herein set forth.

In consideration whereof, and for as much as your Orator is remediless in the premises at and by the strict rules of the common law, and is only relievable in a court of equity where matters of this kind are properly cognizable and relieveable,

your Orator, therefore, prays the judgment of 109
this Honorable Court:

That the transactions herein set forth as made between the defendants above named may be declared to be annulled and of no force and effect, and that a resituation of all of the assets of the defendant Arizona Mutual Savings and Loan Association from the defendant Arizona Trust Company be adjudged and decreed and that an accounting between both of the defendants above named be had and taken, and that an accounting between the defendant Loan Association and your Orator and other stockholders similarly situated be ordered and decreed.

And that, inasmuch as the said defendant Loan 110
Association has been since April 11, 1911, and now is insolvent, as aforesaid that a receiver be appointed with authority to reduce to possession all of the assets of the said defendant Loan Association wheresoever found or situated, and that the court appoint a master to take proof of the facts alleged in this, your Orator's, bill and to determine the rights and equities of your said Orator, and all of the parties concerned herein. And that the affairs of the said defendant Loan Association be wound up, its assets marshaled as aforesaid, and distributed to those found to be entitled thereto.

And your Orator further prays that a writ 111
of injunction issue out of and under the seal of this Honorable Court, according to the form of the statute in such case made and provided, directing, commanding, enjoining and restraining the said defendant Arizona Trust Company, its officers, directors, agents and all other persons, from interfering with, transferring, selling or disposing of any of the said property and assets of the said defendant Loan Association.

And that your Orator may have such other and further relief in the premises as the nature

112 and circumstances of this case may require, and to this Honorable Court may seem meet and proper.

And may it please your Honor to grant unto your Orator a writ of subpoena of the United States of America, issued out of and under the seal of this Honorable Court, directed to the defendant Arizona Mutual Savings and Loan Association, and to the defendant Trust Company, then and thereby commanding each of said defendants, on a day certain thereof to be named, and under a certain penalty, to be and appear before this Honorable Court then and there to answer (but not under oath, an answer under
113 oath being expressly waived), all and singular the premises, and to stand to, to perform and abide by the said order, direction and decree as may be made against them in the premises, as shall seem meet and agreeable to equity and good conscience, together with the costs and expenses of this suit.

And your Orator, as in duty bound, will ever pray.

LEROY ANDERSON,
WILLIAM M. SEABURY,
114 Solicitors for Complaint.

UNITED STATES OF AMERICA,	}	SS:
DISTRICT OF ARIZONA,		
STATE OF ARIZONA,		
COUNTY OF MARICOPA.		

William M. Seabury, being duly sworn, says: That he is a solicitor of this court; that he is one of the solicitors for the complainant above named. That he has read the foregoing bill of complaint and knows the contents thereof. That the alle-

gations therein contained, as far as they relate 115
to his own acts, are true, and as far as they relate
to the acts of others he believes them to be true.
That in regard to all matters and things in the
foregoing bill of complaint alleged which are not
within the personal knowledge of this deponent,
the deponent has been fully informed and he be-
lieves that the same are true. That the reason
why this bill of complaint is not verified by the
complainant herein and is verified by the depon-
ent, is that complainant is, as deponent is in-
formed and verily believes, a non-resident of the
state of Arizona, and a resident of the state of
California, and is now absent from the state of
Arizona, and is inaccessible thereto, and that the 116
facts therein alleged are peculiarly within the
knowledge of deponent as obtained by him from
examinations, personally conducted by him, of the
records on file before the Arizona Corporation
Commission in connection with the application of
the Arizona Trust Company for a certificate
authorizing it to transact business in the state of
Arizona, and from all the testimony which de-
ponent has heard relating to the subject matter
herein involved, and from communications re-
ceived by deponent from many other stockholders
in the defendants above named and from other
sources of information.

W. M. SEABURY.

117

Subscribed and sworn to before me, this 13th
day of July, A. D. 1912.

O. E. SCHUPP,
Notary Public.

My commission expires February 15, 1916.

IN THE

FOR THE DISTRICT OF ARIZONA.

VS.

Defendants.

In Equity.

No.

119

The petition of John Dennett, Jr., J. G. Bogard, J. G. Keating, Rose Boehmer, Edward F. Brown, Ross H. Blakely, John W. Harris, Jr., E. B. Tinker, A. E. Morcom, Margarite Babbitt, Fred Hensing, Thomas Ricket, Charles Schulz, John Wagner, August Johnson, J. Griffiths, John Francis, Balzer Heck, August Schwalbe, Elmer Carroll, Frank Smakel, August Neu, William Lannom, Martin Taylor, Dave Lovell, John Sleimetz, Maud Webster, Frank Conrad, Fred Albright, John Simmons, M. Kirschwing, Olaf Olson, Theodore Holton, Hugo Sandguist, Eugene Seeley, E. F. Stachler, James H. East, F. E. Cadwell and Margaret Cadwell, intervenors herein, through their attorney and solicitor, William M. Seabury, respectfully alleges and shows to this Honorable Court:

That heretofore, and on July 15, 1912, there was filed in this Honorable Court a bill of complaint in equity wherein one Charles W. Clark was complainant and the Arizona Mutual Savings & Loan Association, and the Arizona Trust

Company were defendants. That said suit and 121
controversy was brought by the complainant
above named on behalf of himself and all others
similarly situated, as stockholder in the defend-
ant, the Arizona Mutual Savings and Loan Asso-
ciation, for the relief prayed for in said bill of
complaint.

2. That the petitioners, John Dennett, Jr., J.
G. Bogard, J. G. Keating and Rose Boehmer, are
and at all times since the 1st of April, 1911, have
been stockholders in the defendant, Arizona Mu-
tual Savings and Loan Association, and that each
and all the other petitioners above named since
April, 1911, have become and now are stockhold- 122
ers in the defendant Arizona Trust Company.

3. That each of your petitioners above named
desire to intervene in the above entitled cause in
support of the allegations contained in complain-
ant's bill heretofore filed herein, to the end that
the rights of your said petitioners and each of
them, in connection with each and all of the mat-
ters set forth in said complainant's bill may be
protected and may be submitted to the jurisdic-
tion of this court, by it to be dealt with in accord-
ance with law and equity and the rules and prac-
tice of this Honorable Court. And in this con-
nection, your said petitioners and each of them, 123
in support of this, their petition for leave to in-
tervene, refer to and beg leave to make a part
hereof as though set forth at length herein each
and every paragraph of the complainant's bill of
complaint herein, save and except so much of
paragraph 3 thereof as relates exclusively to the
complainant herein.

4. That in addition to the matters herein set
forth by reference to complainant's bill as afore-
said, your petitioners herein, who are stockhold-

124 ers in the defendant Arizona Trust Company, as
aforesaid, allege that heretofore each of said peti-
tioners were stockholders in the defendant, Ari-
zona Mutual Savings and Loan Association, and
as such entitled to all the rights and privileges of
such stockholders in and to their proportionate
share of the assets and properties of the said de-
fendant Arizona Mutual Savings and Loan Asso-
ciation. *That at various times subsequent to*
April, 1911, your said petitioners, and each of
them, were induced to surrender their said stock
in the Arizona Mutual Savings and Loan Asso-
ciation by the false and fraudulent misrepresenta-
125 *tion made to them by the Arizona Trust Com-*
pany and the Arizona Mutual Savings and Loan
Association: 1. To the effect that in April, 1911,
\$130,000 worth of the assets of the Arizona Mu-
tual Savings and Loan Association had been in
fact lawfully transferred to and had become the
property of the defendant Arizona Trust Com-
pany. 2. That if the said petitioners would sur-
render their said stock in the Arizona Mutual
Savings and Loan Association in exchange for
preferred stock in the defendant Arizona Trust
Company, your said petitioners so exchanging
their said Loan Association stock would receive
rights, privileges and benefits in the Arizona
Trust Company which were the same as and iden-
126 tical with the rights, privileges and benefits which
your said petitioners had enjoyed as stockhold-
ers in the said Arizona Mutual Savings and Loan
Association. 3. That as and when the said de-
fendant Trust Company acquired the assets of
the said Arizona Mutual Savings and Loan Asso-
ciation, the said defendant Trust Company would
continue to care for the investment of those of
your petitioners who exchanged their stock in the
Arizona Mutual Savings and Loan Association
for stock in the Arizona Trust Company, as afore-
said, without charge or expense either against

any of your said petitioners, or against the said 127
 Arizona Mutual Savings and Loan Association.
 But your said petitioners allege the fact to be that
 each and all of said representations were wholly
 false and untrue, and that in fact the assets of the
 said Arizona Mutual Savings and Loan Associa-
 tion have not yet been transferred of record to
 the said defendant Trust Company, although the
 said defendant Trust Company has at all times
 since April, 1911, exercised complete dominion
 and control over said assets. And, moreover,
 that when your said petitioners received their cer-
 tificates of stock in the Arizona Trust Company
 in Exchange for their stock in the Arizona Mu-
 tual Savings and Loan Association, your said 128
 petitioners ascertained and discovered that the
 stock in the Arizona Trust Company was not in
 any way similar to the stock which they had sur-
 rendered in the Arizona Mutual Savings and
 Loan Association, and that the representations
 made to your said petitioners by the said Trust
 Company and its officers were in this respect
 wholly false and untrue. And your said peti-
 tioners further allege that since April, 1911, the
 defendant Arizona Trust Company has charged
 the expense of operating and maintaining the
 said defendant Trust Company against the Ari-
 zona Mutual Savings and Loan Association and
 the assets thereof, and that the said representa- 129
 tions made to your said petitioners by the said de-
 fendant Trust Company, its officers and agents,
 in this respect was wholly false and untrue.

5. That said representations and each of them
 were false and untrue and that the defendant
 Trust Company, its officers and agents, well knew
 when such representations were made, as afore-
 said, that such representations, and each of them,
 were false and untrue, and that said representa-
 tions made by the defendant Trust Company, its

130 officers and agents who then and there occupied a position of trust and confidence towards your said petitioners, were well calculated to deceive your said petitioners, and that said representations and each of them were so made, as aforesaid, with intent and for the purpose of inducing your said petitioners and others to rely upon and believe said representations and each of them to be true, and to act upon said representations and each of them accordingly. And that your said petitioners, and each of them, in ignorance of the falsity of said representations, and believing them to be true, and reposing faith and reliance in the said defendant Trust Company, its officers and
 131 agents, relied upon said representations and each of them exclusively and solely by reason thereof were induced to and did surrender their said stock in the Arizona Mutual Savings and Loan Association in exchange for stock in the defendant Arizona Trust Company.

6. And your said petitioners, as stockholders in the said defendant Trust Company, further allege that at all times since the organization of the defendant Trust Company, to-wit, about March 21, 1911, the management of said trust company has been wasteful, extravagant, dishonest and incompetent.

132 That until about June 21, 1912, one A. J. Edwards was the vice-president of the defendant Trust Company. That he dominated and controlled the policy and entire management of both of the defendants for a considerable period of time, if not during the whole interval between April, 1911, and June 21, 1912. That said A. J. Edwards claimed to be the owner of three hundred shares of the common stock of the defendant Trust Company which constituted a majority, if not the whole, of the common stock of the said Trust Company outstanding, from the date of its

organization until the present time, except ten 133
 additional shares of said common stock. That
 the said A. J. Edwards acquired the said three
 hundred shares of the common stock of the de-
 fendant Trust Company unlawfully and without
 any valid or legal consideration therefor. But
 that notwithstanding said fact, the said A. J. Ed-
 wards voted or caused to be voted the said stock
 in his own favor and caused a salary of about
 four hundred dollars a month to be awarded to
 himself as an officer and director of said defend-
 ant Trust Company. And your petitioners allege
 that the said salary was extravagant and wasteful
 and that the services of the said A. J. Edwards
 were not worth to the said company or to its 134
 stockholders other than the said Edwards four
 hundred dollars per month, or any other sum.

That your said petitioners are informed and
 verily believe that the wife of the said A. J. Ed-
 wards was known as J. O. Edwards, and that the
 father of the said A. J. Edwards was also known
 as J. O. Edwards. And in this connection your
 petitioners allege, upon information and belief,
 that through the medium of J. O. Edwards, either
 the wife or father of the said A. J. Edwards, the
 said A. J. Edwards caused the defendant Trust
 Company to acquire an interest in various prop-
 erties, among others, the property in which said
 defendant Trust Company now has and maintains 135
 its office at the northwest corner of Second Ave-
 nue and Washington Street, in the city of Phoe-
 nix, Arizona, and that said J. O. Edwards
 contracted to buy the said property for the
 sum of fifty thousand dollars, and caused to
 be paid on account of the purchase price there-
 of the sum of only seven or eight thousand
 dollars, and then within a very short period
 of time thereafter, the exact period of time being
 unknown to your petitioners, the said A. J. Ed-
 wards caused said property to be bought by the

136 said Trust Company for the price of eighty thousand dollars. And your petitioners further allege that, although not more than eight thousand dollars was paid by some one on account of the purchase price of said property, and although the said property is subject to a mortgage of about forty-three thousand dollars, the defendant Trust Company claims to have an equity therein of thirty-seven thousand dollars, and now carries said property upon their books as an asset valued at eighty thousand dollars. But it appears from Schedule A of assets of the said defendant Trust Company, which said defendant caused to be filed with Arizona Corporation Commission
 137 on or about June 15, 1912, that the following statement is made—balance to be paid February 1, 1913. Deed to be delivered. Mortgage \$35,000, five years from January 1, 1912, at 7%. Deed and mortgage in escrow, carried as real estate. Contracts purchase estimated equity \$37,000.”

And your said petitioners allege in this connection that between the date of purchase of said property in the name of J. O. Edwards for the price of fifty thousand dollars, and the date of pretended sale thereof to the Trust Company for the price of eighty thousand dollars, there was in fact no change or increase whatever in the actual value of said property, and that said increase is and was
 138 wholly fictitious.

And your said petitioners further allege that by the same or similar methods the said A. J. Edwards caused about 160 acres of land known as the Evans property and situated north of the city of Phoenix, to be bought for about \$200 per acre, and almost immediately thereafter caused the same to be sold to or acquired by the defendant Trust Company at the price of \$400 per acre, and that there was in fact no increase in the value thereof between such sales.

And your said petitioners further allege that

the said A. J. Edwards and others associated with him used the assets and properties derived from the defendant Loan Association solely for their own benefit and in utter disregard of the interests of your petitioners or of the rights of the stockholders of the defendant Loan Association. That as evidence of this your petitioners allege that in November, 1911, the said A. J. Edwards and others associated with him, then being in absolute and complete control of the affairs of the said defendant Trust Company, as well as the affairs of the defendant Loan Association, caused the defendant Trust Company to agree to buy 185 shares, of the par value of \$100 each, of the capital stock of a corporation known as the Farmers & Merchants Bank of Phoenix, which institution then, or shortly thereafter, was in a failing condition, for which stock the said defendant Trust Company agreed to pay the price of \$18,500, which purchase price said Trust Company agreed to pay either in cash or in real estate securities equivalent in value. That thereafter the defendant Trust Company attempted to perform said contract by the delivery of certain real estate securities, which securities, however, were in fact derived by said Trust Company from the said defendant Loan Association, which securities were of the approximate value of \$18,500, and thereupon the defendant Trust Company, claiming to own and to have acquired by such purchase 185 shares of stock in said Farmers & Merchants Bank, proceeded to vote the same and to elect to the directorate of the said Farmers & Merchants Bank the said A. J. Edwards, together with his other associates. And shortly thereafter, so much of said transaction as involved the delivery of the said \$18,500 worth of securities of the said defendant Loan Association to the said Farmers & Merchants Bank was declared illegal by the then auditor of the late territory of Arizona, and there-

142 upon the said securities were redelivered to the said Trust Company, and almost immediately thereafter the said Farmers & Merchants Bank suspended business, closed its doors and became wholly insolvent. That said transaction could by no possibility have been and in fact was not of the slightest benefit or advantage to the stockholders of the defendant Loan Association, whose assets were used in said transaction, or of any benefit to the stockholders of the defendant Trust Company. But, on the contrary, the said transaction was made and entered into solely for the benefit and personal advancement of the said A. J. Edwards at the sacrifice of the rights and interests of your said petitioners and of the stockholders in the said defendant Loan Association. And in this connection your petitioners allege that as a result of said transaction there is now pending in the Superior Court of the State of Arizona, in and for the County of Maricopa, an action wherein the said Farmers & Merchants Bank is plaintiff and the said defendant, Arizona Trust Company, is defendant, which said action is brought to recover the sum of \$18,500 in cash from said defendant Trust Company by reason of the contract heretofore set forth. From all of which your petitioners allege that the assets and properties in which they have an interest, either
 143
 144 as stockholders in the said defendant Trust Company, or in the defendant Loan Association, have been and are wasted and depleted by reason of the matters herein set forth.

And your petitioners further allege that during the period aforesaid in which the said A. J. Edwards had and exercised complete control of the affairs of said Trust Company, the said Edwards caused a young man named Olsen to occupy the titular position of secretary of the defendant Loan Association, while at the same time said Olsen was acting as secretary of the defendant Trust

Company. That said A. J. Edwards caused said 145
 Olsen, who was at all times completely under the
 domination and control of the said A. J. Edwards,
 to sign and circulate and disseminate among the
 stockholders of the defendant Loan Association,
 by means of the United States mail, much evasive
 and deceitful literature, calculated to deceive, and
 which in fact did deceive your petitioners in many
 particulars. That said Edwards dictated most,
 if not all of the minutes of the alleged directors'
 and stockholders' meetings of both the Companies
 and caused the said Olsen to subscribe thereto as
 occasion required. That said Olsen as secretary
 of the defendant Loan Association is charged
 with the duty of having in his custody the books 146
 and valuable papers and records of the defendant
 Loan Association, but by reason of his position
 as secretary of the defendant Trust Company and
 by reason of his present control by the officers of
 the defendant Trust Company he is wholly unfit
 to protect and is in fact wilfully disregarding the
 rights of the stockholders of the defendant Loan
 Association by assisting the present officers and
 directors of the defendant Loan Association to
 complete the transfer of the assets of the defend-
 ant Loan Association to the said defendant Trust
 Company. That since April, 1911, the defendant
 Loan Association has entirely suspended its busi-
 ness and ceased to be a going concern as a sav- 147
 ings and loan company and has even entered into
 a contract with the defendant Trust Company
 that it would cease business for a period of two
 years from April, 1911, would not compete in
 business with the said defendant Trust Company.
 That in fact, the defendant Loan Association
 maintains no office whatever of its own, but the
 officers and directors of the defendant Trust Com-
 pany assert that the office of the defendant Loan
 Association is in the same office as that occupied
 by the said defendant Trust Company.

148 7. That on or about June 20 or 21, 1912, there was and is now pending before the Arizona Corporation Commission the application of the defendant Trust Company for a certificate authorizing it to do business and engage in the sale of its stock. Upon information and belief your petitioners allege that about six o'clock in the evening of June 21, 1912, the said A. J. Edwards was subpoenaed to appear before the said Corporation Commission and to testify concerning the matters relating to said Arizona Trust Company on June 21, 1912. That when the said subpoena was served upon the said A. J. Edwards he was still vice-president of the defendant Trust Company
149 and in complete control thereof, but during the night-time the said A. J. Edwards sold, or pretended to sell, or transfer, to one W. T. Smith and one Dunlap and one J. Wesley Walker, the pretended interest of the said A. J. Edwards in and to the 300 shares of the common stock of the said Trust Company, and thereupon and during the night-time, as aforesaid, the said Smith assumed the presidency of the said defendant Trust Company and the said Dunlap assumed to become one of the officers thereof, and the said Walker remained and still remains as an undisclosed principal thereof. And thereupon the said Edwards, after a brief examination before the said Corpora-
150 tion Commission on June 21, 1912, departed from the state of Arizona, and has not to the knowledge of your petitioners returned, and your petitioners believe that the said A. J. Edwards has fled from the jurisdiction of the courts of Arizona.

And your petitioners further allege in this connection that the issue before the said Corporation Commission with reference to the said application of the said Arizona Trust Company involves an inquiry as to the present solvency of the said defendant Trust Company, and that up to the present time the said Corporation Commission

has not granted the said defendant Trust Com- 151
pany any leave or permission authorizing it to
proceed with its said business as desired.

8. And your petitioners further allege that as
a result of the said representations made to your
said petitioners, as aforesaid, your said petition-
ers and many others, surrendered their stock in
the said defendant Loan Association for stock in
the said Trust Company, as aforesaid, and that
under the direction of the said Edwards, the con-
summation of the sale of all of the assets of the
said Loan Association in exchange for said 130,-
000 shares of preferred stock in the defendant
Trust Company was prolonged and continued 152
until sometime in September or November, in the
year 1911, and until such time as the defendant
Trust Company had acquired about eighty-five
per cent of the said stock in the defendant Loan
Association heretofore owned, among others, by
your said petitioners, and thereupon, to-wit, in or
about November, 1911, after both of said corpor-
ate defendants had announced the completion and
consummation of the purchase of the defendant
Loan Association's assets by the defendant Trust
Company for the consideration aforesaid, and
after your petitioners as stockholders of the de-
fendant Loan Association, among others, had
acted upon said representations and had sur- 153
rendered or assigned their said stock to the de-
fendant Trust Company in exchange for its stock,
the said defendant Trust Company voted the
stock so acquired by it and purported and at-
tempted to repudiate the whole transaction relat-
ing to said purchase of the assets of the said de-
fendant Loan Association, and attempted to sub-
stitute in its place and stead a wholly different
contract than that which had been agreed upon by
both companies and acted upon by your petition-
ers, and a large number of stockholders similarly

154 situated. And that it is now difficult, if not impossible, to determine the exact status of the affairs of either or both companies until there can be a judicial inquiry into the same, and that due to the confusion and intermingling of the assets of the two corporations, and the creation of reciprocal equities in favor of your said petitioners as former stockholders in the defendant Loan Association, who have been induced through fraud and misrepresentations as aforesaid, to surrender their rights therein and to acquire stock in the defendant Trust Company, the rights of your petitioners can only be protected by and through this Honorable Court and by extending to your
155 said petitioners the right and privilege to intervene in the above entitled cause.

9. Upon information and belief your petitioners allege the fact to be that the defendant Arizona Trust Company is now wholly insolvent and unable to meet and discharge the various obligations which it has assumed, and that your petitioners have no other adequate remedy at law to redress the wrongs and grievances herein set forth, except in a court of equity, and in the above entitled cause.

156 Wherefore, your petitioners and each of them respectfully pray this Honorable Court:

1. That they and each of them may be permitted to intervene in the above entitled cause and join in the prayer of the complainant therein.

2. Your petitioners and each of them, who are stockholders in the defendant, Arizona Trust Company, pray that the transaction whereby said petitioners assigned and transferred their stock in the defendant Arizona Mutual Savings and Loan Association for stock in the defendant Ari-

zona Trust Company may be rescinded and de- 157
clared to be of no force and effect.

3. And that a restitution or re-assignment to the said petitioners of the stock in the Arizona Mutual Savings and Loan Association so transferred by them, and each of them, to the defendant Trust Company be adjudged and decreed and that the cancellation of the certificates of stock received by said petitioners from the said Trust Company as aforesaid may be ordered.

4. And that it be adjudged and determined that the transaction whereby your petitioners gave up their said stock in the defendant Loan 158
Association for stock in the defendant Trust Company, is wholly void and of no effect.

5. And further, that the defendant Trust Company be required to make complete restitution of all of the properties heretofore received by it from the defendant Arizona Mutual Savings and Loan Association, together with the interest and income thereon; and

6. That said restitution be made to the receiver which your petitioners pray this court to appoint for the purpose of preserving and taking into his possession all of the assets of both of said 159
defendants.

And to the end that full and complete justice and equity may be done between all of the parties hereto and under the well settled rule in equity in such cases provided, that where the court assumes jurisdiction of the matters in controversy for one purpose, such jurisdiction will be exercised for all purposes, and to the further end that by permitting your said petitioners to intervene herein and have their rights herein adjudged and determined by this Honorable Court, a multi-

160 plicity of suits against said defendant Trust Company may thereby be avoided.

7. That an accounting between both of said defendant companies be had, as well as an accounting between the said defendants and their respective stockholders. And that a master be appointed to take proofs of the facts herein alleged and to determine the rights and equities of all of the parties concerned therein, and that the affairs of both companies be wound up, their assets marshaled and distributed, and to whomsoever may be adjudged to be entitled thereto.

161 8. And that your petitioners have such other and further and different relief as to the court may seem meet and proper in the premises.

9. And together with the costs and disbursements in this action expended.

WILLIAM M. SEABURY,
Solicitor for Petitioners.

162 UNITED STATES OF AMERICA,)
DISTRICT OF ARIZONA,) ss.
STATE OF ARIZONA,)
COUNTY OF MARICOPA.)

William M. Seabury, being duly sworn, says: That he is a solicitor of this court. That he is the solicitor for the petitioners above named. That he has read the foregoing petition and knows the contents thereof. That the allegations therein contained, as far as they relate to his own acts, are true, and as far as they relate to the acts of others he believes them to be true. That in regard to all matters and things in the fore-

going petition alleged which are not within the 163
 personal knowledge of this deponent, the deponent
 has been fully informed and he believes that the
 same are true. That the reason why this petition
 is not verified by the petitioners herein and is ver-
 ified by the deponent, is that many of the said
 petitioners are absent from the county of Mari-
 copa where deponent resides and are inaccessible
 to deponent, and by reason of the great number of
 petitioners interested herein it becomes and is
 impractical to have said petition verified by each
 of said petitioners in person. And that the facts
 in said petition alleged are peculiarly within the
 knowledge of deponent as obtained by him from
 examinations, personally conducted by him, of the 164
 records on file before the Arizona Corporation
 Commission in connection with the application of
 the Arizona Trust Company for a certificate
 authorizing it to transact business in the state of
 Arizona, and from all the testimony which de-
 ponent has heard relating to the subject matter
 herein involved, and from communications re-
 ceived by deponent from many other stockhold-
 ers in the defendants above named and from other
 sources of information.

Subscribed and sworn to before me, this.....
 day of July, A. D. 1912.

165

Notary Public.
 My commission expires February 15, 1916.

IN THE

District Court of the United States
FOR THE DISTRICT OF ARIZONA.

vs.

Defendants.

In Equity.

No.

INTERVENING PETITION No. 2.

168 The petition of Harry E. Harter, H. S. Gray, Mary E. Ellsworth, L. M. Gustafson, A. H. Ferrin, Lucy H. Purdum, H. P. Wightman, A. C. Lockwood, Alex Anderson, D. Bohn, Erit Equist, A. H. Oeltjen, E. L. Hosler, S. L. Hosler, Glenn W. Morse, N. G. Tang Fong, E. A. Gillard, J. C. Wilhelm, Frank A. Moss, George K. Anderson, J. D. LaChance, Grace Langston, Frank A. Flickinger, Charles J. Petterson, E. F. Stabler, Nettie Sheldon, Lloyd C. Henning, Wilson Patterson, E. W. Clayton, William C. Faulkner, Walter W. Williams, J. N. Stratton, W. E. Platt, John F. Weber, S. L. Ijams, Ida N. Frye, William Sobey, William Whalley, O. W. Miller, William H. Watts, Globe Lumber Company, Alfred Hansen, Clara F. Bloom, nee Clara Ferrin, Orville Young, Fred W. Horn, J. C. Bradley, Mary Bleak, Oliver Meyers, J. W. McLean, intervenors herein, through their attorney and solicitor, William M. Seabury, respectfully alleges and shows to this Honorable Court:

That heretofore and on July 15, 1912, there was filed in this Honorable Court a bill of complaint in equity, wherein one Charles W. Clark was complainant and the Arizona Mutual Savings and Loan Association and the Arizona Trust Company were defendants; that said suit and controversy was brought by the complainant above named on behalf of himself and all others similarly situated as stockholders in the defendant Arizona Mutual Savings and Loan Association and for the relief prayed for in said bill; and thereafter, and to-wit, on or about July 15, and after the jurisdiction of this court had attached with reference to the cause of the said complainant and the subject matter therein involved, a certain petition in intervention was filed herein by certain petitioners claiming to occupy a position similar to that of the complainant above named; and thereafter, and on or about August 5, 1912, the said intervening petitioners received authority and permission from this Honorable Court so to intervene and to prosecute their rights herein, and that the above entitled cause is still pending undetermined herein and is not yet at issue upon the pleadings of said first petition in intervention and the answer, demurrer or plea to be interposed thereto. 170 171

II.

That the petitioners named in this paragraph are now and at all times since April 1, 1911, have been stockholders in the defendant Arizona Mutual Savings and Loan Association and have paid into said Arizona Mutual Savings and Loan Association on account of the purchase price of their said stock the respective sums set opposite the names of each such stockholders, as follows:

172	Harry E. Harter.....	\$ 168.00
	H. S. Gray.....	570.00
	Mary E. Ellsworth	560.00
	L. M. Gustafson.....	500.00
	A. H. Ferrin.....	288.00
	Lucy H. Purdum.....	144.00
	H. P. Wightman.....	450.00
	A. C. Lockwood.....	472.82
	Alex Anderson	675.00
	D. Bohn	600.00
	Erit Equist	450.00
	A. H. Oeltjen.....	252.00
	Mary Bleak	72.00
173	Total	\$5,201.82

III.

That each and all of the other petitioners hereinbefore named were, prior to April, 1911, stockholders in the defendant Arizona Mutual Savings and Loan Association, but since April, 1911, each of said persons have become and now are stockholders in the defendant Arizona Trust Company, and have paid in as a total to both of said companies the amounts set opposite the names of each of such stockholders, respectively, as follows:

174	E. L. Hosler.....	\$ 390.00
	S. L. Hosler.....	264.00
	Glenn W. Morse.....	324.00
	N. G. Tang Fong.....	192.00
	A. E. Gillard.....	504.00
	J. C. Wilhelm.....	210.00
	Frank A. Moss.....	252.00
	Geo. K. Anderson.....	504.00
	J. D. LaChance.....	180.00
	Grace Langston	600.00
	Frank A. Flickinger.....	280.00
	Charles J. Petterson.....	270.00

E. F. Stabler.....	458.00	175
Nettie Sheldon	282.00	
Lloyd C. Henning.....	210.00	
E. W. Clayton.....	864.00	
William C. Faulkner.....	1,000.00	
Walter W. Williams.....	402.00	
J. N. Stratton.....	204.00	
W. E. Platt.....	204.00	
John F. Weber.....	192.00	
S. G. Ijams.....	300.00	
Ida N. Frye.....	600.00	
William Sobey.....	318.00	
William Whalley	318.00	
O. W. Miller.....	354.00	
William H. Watts.....	1,680.00	176
Globe Lumber Co.....	899.10	
Alfred Hansen	552.00	
Clara F. Bloom, nee Clara Ferrin.....	318.00	
Orville Young	204.00	
Fred M. Horn	285.00	
J. C. Bradley.....	300.00	
Oliver Meyers	180.00	
J. W. McLean.....	600.00	
<hr/>		
Arizona Trust Company Total.....	\$14,964.10	
Arizona Mutual Savings & Loan		
Association Total	5,201.82	
<hr/>		
Total.....	\$20,165.90	177

That each and all of your petitioners named in this petition both in Paragraph II and Paragraph III hereof, desire to intervene in the above entitled cause in support of the allegations contained in the complainant's bill heretofore filed herein and in the first intervening petition filed herein on or about July 15, 1912, to the end that the rights of your said petitioners and each of them in connection with each and all of the matters set forth in said complainant's bill and in

173 said first intervening petition may be protected and may be submitted to the jurisdiction of this court, by it to be dealt with in accordance with law and equity and the rules and practice of this Honorable Court.

And in this connection, your said petitioners and each of them, in support of this, their petition of intervention herein, beg leave to refer to and make a part hereof, as though set forth at length, each and every paragraph of complainant's bill of complaint herein, save and except so much of Paragraph Three thereof as relates exclusively to the complainant herein, and also, your said petitioners and each of them beg leave to adopt and
 179 make a part hereof, as though set forth at length herein, each and every allegation and paragraph contained in the said first petition of intervention filed herein on or about July 15, 1912, except Paragraphs One, Two and Three of said first intervening petition, and each of your said petitioners hereby re-aver and re-allege, as though set forth at length herein, each and every such allegation contained in said bill and in said first intervening petition, as though the same were set out at length herein;

That said petitioner, Globe Lumber Company, is a corporation duly organized and existing under the laws of Arizona, having its principal office
 180 and place of business at the City of Globe, Gila County, Arizona.

WHEREFORE, your petitioners and each of them respectfully adopt and hereby pray in accordance with the form of complainant's bill herein, and further:

1. That they and each of them may be permitted to intervene in the above entitled cause and join in the prayer of the complainant therein.

2. Your petitioners and each of them, who are

stockholders in the defendant, Arizona Trust Company, pray that the transaction whereby said petitioners assigned and transferred their stock in the defendant Arizona Mutual Savings and Loan Association for stock in the defendant Arizona Trust Company may be rescinded and declared to be of no force and effect. 181

3. And that a restitution or re-assignment to the said petitioners of the stock in the Arizona Mutual Savings and Loan Association so transferred by them, and each of them, to the defendant Trust Company be adjudged and decreed and that the cancellation of the certificates of stock received by said petitioners from the said Trust Company as aforesaid may be ordered. 182

4. And that it be adjudged and determined that the transaction whereby your petitioners gave up their said stock in the defendant Loan Association for stock in the defendant Trust Company, is wholly void and of no effect.

5. And further that the defendant Trust Company be required to make complete restitution of all the properties heretofore received by it from the defendant Arizona Mutual Savings and Loan Association, together with the interest and income thereon; and 183

6. That said restitution be made to the receiver which your petitioners pray this court to appoint for the purpose of preserving and taking into his possession all of the assets of both of said defendants.

And to the end that full and complete justice and equity may be done between all of the parties hereto and under the well settled rule in equity in such cases provided, that where the court assumes jurisdiction of the matters in controversy

184 for one purpose, such jurisdiction will be exercised for all purposes, and to the further end that by permitting your said petitioners to intervene herein and have their rights herein adjudged and determined by this Honorable Court, a multiplicity of suits against said defendant Trust Company may thereby be avoided.

7. That an accounting between both of said defendant companies be had, as well as an accounting between the said defendants and their respective stockholders. And that a master be appointed to take proofs of the facts herein alleged and to determine the rights and equities of
 185 all of the parties concerned therein, and that the affairs of both companies be wound up, their assets marshaled and distributed, and to whomsoever may be adjudged to be entitled thereto.

8. And that your petitioners have such other and further relief as to the court may seem meet and proper in the premises.

9. And together with the costs and disbursements in this action expended.

186 WILLIAM M. SEABURY,
 306 Fleming Bldg., Phoenix, Arizona,
 Solicitor for Petitioners.

UNITED STATES OF AMERICA, }
 DISTRICT OF ARIZONA, } ss.
 STATE OF ARIZONA, }
 COUNTY OF MARICOPA. }

William M. Seabury, being duly sworn says:
 That he is a solicitor of this court. That he is
 the solicitor for the petitioners above named.

That he has read the foregoing petition and 187
 knows the contents thereof. That the allegations
 therein contained, as far as they relate to his own
 acts, are true, and as far as they relate to the acts
 of others he believes them to be true. That in
 regard to all matters and things in the foregoing
 petition alleged which are not within the personal
 knowledge of this deponent, the deponent has
 been fully informed and he believes that the same
 are true. That the reason why this petition is not
 verified by the petitioners herein and is verified by
 the deponent, is that many of the said petitioners
 are absent from the county of Maricopa, where
 deponent resides and are inaccessible to deponent,
 and by reason of the great number of petitioners 188
 interested herein it becomes and is impractical to
 have said petition verified by each of said peti-
 tioners in person. And that the facts in said peti-
 tion alleged are peculiarly within the knowledge
 of deponent as obtained by him from examina-
 tions, personally conducted by him, of the records
 on file before the Arizona Corporation Commis-
 sion in connection with the application of the
 Arizona Trust Company for a certificate author-
 izing it to transact business in the state of Ari-
 zona, and from all the testimony which deponent
 has heard relating to the subject matter herein
 involved, and from communications received by 189
 deponent from many other stockholders in the de-
 fendants above named and from other sources of
 information.

W. M. SEABURY.

Subscribed and sworn to before me this.....
 day of August, A. D. 1912.

G. M. FORBES,
 Notary Public.

(My commission expires.....)

EXHIBIT 4.

IN THE

District Court of the United States

FOR THE DISTRICT OF ARIZONA.

CHARLES W. CLARK,
Complainant,

vs.

ARIZONA MUTUAL SAVINGS
AND LOAN ASSOCIATION,
and the Arizona Trust Com-
pany,

Defendants.

In Equity.

No.

191

INTERVENING PETITION No. 3.

The petition of George S. Hughes, Mrs. W. J. Jackson, Joseph Carpenter and John Stiegler, intervenors herein, through their attorney and solicitor, William M. Seabury, respectfully alleges and shows to this Honorable Court:

I.

192 That heretofore and on July 15, 1912, there was filed in this Honorable Court a bill of complaint in equity, wherein one Charles W. Clark was complainant and the Arizona Mutual Savings and Loan Association and the Arizona Trust Company were defendants; that said suit and controversy was brought by the complainant above named on behalf of himself and all others similarly situated as stockholders in the defendant Arizona Mutual Savings and Loan Association and for the relief prayed for in said bill; and thereafter, and to-wit, on or about July 15, and after the jurisdiction of this court had attached

with reference to the cause of the said complain- 193
ant and the subject matter therein involved, a
certain petition in intervention was filed herein
by certain petitioners claiming to occupy a posi-
tion similar to that of the complaint above
named; and thereafter and on or about August
5, 1912, the said intervening petitioners received
authority and permission from this Honorable
Court so to intervene and to prosecute their rights
herein, and that the above entitled cause is still
pending undetermined herein.

II.

That the petitioners named in this paragraph 194
are now and at all times since April 1, 1911, have
been stockholders in the defendant Arizona Mu-
tual Savings and Loan Association and have paid
into said Arizona Mutual Savings and Loan As-
sociation on account of the purchase price of their
stock the respective sums set opposite the names
of each such stockholders, as follows:

George S. Hughes.....	\$ 288.00
Mrs. W. J. Jackson.....	150.00

III.

That each and all of the other petitioners here- 195
inbefore named were, prior to April, 1911, stock-
holders in the defendant Arizona Mutual Sav-
ings and Loan Association, but since April, 1911,
each of said persons have become and now are
stockholders in the defendant Arizona Trust
Company, and have paid in as a total to both of
said companies the amounts set opposite the
names of each of such stockholders respectively,
as follows:

Joseph Carpenter	\$ 216.00
John Stiegler	463.85

IN THE

District Court of the United States
FOR THE DISTRICT OF ARIZONA.

191

CHARLES W. CLARK, Complainant, vs. ARIZONA MUTUAL SAVINGS AND LOAN ASSOCIATION, and the Arizona Trust Com- pany, Defendants.	In Equity. No.
---	------------------------

INTERVENING PETITION No. 3.

The petition of George S. Hughes, Mrs. W. J. Jackson, Joseph Carpenter and John Stiegler, intervenors herein, through their attorney and solicitor, William M. Seabury, respectfully alleges and shows to this Honorable Court:

L.

192 That heretofore and on July 15, 1912, there was filed in this Honorable Court a bill of complaint in equity, wherein one Charles W. Clark was complainant and the Arizona Mutual Savings and Loan Association and the Arizona Trust Company were defendants; that said suit and controversy was brought by the complainant above named on behalf of himself and all others similarly situated as stockholders in the defendant Arizona Mutual Savings and Loan Association and for the relief prayed for in said bill; and thereafter, and to-wit, on or about July 15, and after the jurisdiction of this court had attached

with reference to the cause of the said complain- 193
 ant and the subject matter therein involved, a
 certain petition in intervention was filed herein
 by certain petitioners claiming to occupy a posi-
 tion similar to that of the complaint above
 named; and thereafter and on or about August
 5, 1912, the said intervening petitioners received
 authority and permission from this Honorable
 Court so to intervene and to prosecute their rights
 herein, and that the above entitled cause is still
 pending undetermined herein.

II.

That the petitioners named in this paragraph 194
 are now and at all times since April 1, 1911, have
 been stockholders in the defendant Arizona Mu-
 tual Savings and Loan Association and have paid
 into said Arizona Mutual Savings and Loan As-
 sociation on account of the purchase price of their
 stock the respective sums set opposite the names
 of each such stockholders, as follows:

George S. Hughes.....	\$ 288.00
Mrs. W. J. Jackson.....	150.00

III.

That each and all of the other petitioners here-
 inbefore named were, prior to April, 1911, stock- 195
 holders in the defendant Arizona Mutual Sav-
 ings and Loan Association, but since April, 1911,
 each of said persons have become and now are
 stockholders in the defendant Arizona Trust
 Company, and have paid in as a total to both of
 said companies the amounts set opposite the
 names of each of such stockholders respectively,
 as follows:

Joseph Carpenter	\$ 216.00
John Stiegler	463.85

202 And to the end that full and complete Justice and equity may be done between all of the parties hereto and under the well-settled rule in equity in such cases provided, that where the court assumes jurisdiction of the matters in controversy for one purpose, such jurisdiction will be exercised for all purposes, and to the further end that by permitting your said petitioners to intervene herein and have their rights herein adjudged and determined by this Honorable Court, a multiplicity of suits against said defendant Trust Company may thereby be avoided,

203 7. That an accounting between both of said defendant companies be had, as well as an accounting between the said defendants and their respective stockholders, and that a master be appointed to take proofs of the facts herein alleged and to determine the rights and equities of all of the parties concerned therein, and that the affairs of both companies be wound up, their assets marshaled and distributed, and to whomsoever may be adjudged to be entitled thereto.

8. And that your petitioners have such other and further and different relief as to the court may seem meet and proper in the premises.

204 9. And together with the costs and disbursements in this action expended.

WILLIAM M. SEABURY,
306 Fleming Bldg.,
Phoenix, Arizona.
Solicitor for Petitioners.

UNITED STATES OF AMERICA, }
DISTRICT OF ARIZONA, } ss:
COUNTY OF MARICOPA. }

WILLIAM M. SEABURY, being duly sworn, says:

That he is a solicitor of this court. That he is 205
the solicitor for the petitioners above named. That
he has read the foregoing petition and knows the
contents thereof. That the allegations therein
contained, as far as they relate to his own acts,
are true, and as far as they relate to the acts of
others he believes them to be true. That in regard
to all matters and things in the foregoing petition
alleged which are not within the personal know-
ledge of this deponent, the deponent has been fully
informed and he believes that the same are true.
That the reason why this petition is not verified
by the petitioners herein and is verified by the de-
ponent, is that all of the said petitioners are absent 206
from the county of Maricopa where deponent re-
sides and are inaccessible to deponent, and by
reason of the great number of petitioners inter-
ested herein it becomes and is impractical to have
said petition verified by each of said petitioners
in person. And that the facts in said petition al-
leged are peculiarly within the knowledge of de-
ponent as obtained by him from examinations,
personally conducted by him, of the records on
file before the Arizona Corporation Commission
in connection with the application of the Arizona
Trust Company for a certificate authorizing it to
transact business in the State of Arizona, and
from all the testimony which deponent has heard 207
relating to the subject matter herein involved, and
from communications received by deponent from
many other stockholders in the defendants above
named and from other sources of information.

W. M. SEABURY.

Subscribed and sworn to before me, this.....
day of September, A. D. 1912.

O. E. SCHUPP,
Notary Public.

My commission expires February 15, 1916.

EXHIBIT 5.

IN THE

District Court of the United States

FOR THE DISTRICT OF ARIZONA.

CHARLES W. CLARK,

Complainant,

vs.

ARIZONA MUTUAL SAVINGS

AND LOAN ASSOCIATION,

and the Arizona Trust Com-

pany,

Defendants.

In Equity.

No.

209

INTERVENING PETITION No. 4.

The petition of Ramon Brenna, C. R. Freeman, M. A. Ramirez, E. J. Brunenkant, C. Brunenkant, Thomas Weedon, Frederick E. White, Frederick E. White, assignee of Ah Lee, Sam Y. Barkley, Mrs. J. N. Russell, Cora Dunagan, Helen Weber, W. E. Young, Mrs. M. L. Graves, Mrs. W. S. Hurst, Mrs. C. S. Brown, Maria B. Stevens, A. T. Kleinschmidt, Lysander Cassidy, Rosario C. Brenna, A. J. Durago, H. Capin, L. C. Frederico
 210Gallin,

interveners herein, through their attorneys and solicitor, William M. Seabury, respectfully alleges and shows to this Honorable Court:

I.

That heretofore and on July 15, 1912, there was filed in this Honorable Court a bill of complaint in equity, wherein one Charles W. Clark was complainant and the Arizona Mutual Savings and Loan Association and the Arizona Trust Com-

pany were defendants; that said suit and contro- 211
 versy was brought by the complainant above
 named on behalf of himself and all others simi-
 larly situated as stockholders in the defendant
 Arizona Mutual Savings and Loan Association
 and for the relief prayed for in said bill; and there-
 after, and to-wit, on or about July 15, and after
 the jurisdiction of this court had attached with
 reference to the cause of the said complaint and
 the subject matter therein involved, a certain pe-
 tition in intervention was filed herein by certain
 petitioners claiming to occupy a position similar
 to that of the complainant above named; and
 thereafter and on or about August 5, 1912, the
 said intervening petitioners received authority 212
 and permission from this Honorable Court so to
 intervene and to prosecute their rights herein, and
 that the above entitled cause is still pending un-
 determined herein.

II.

That the petitioners named in this paragraph
 are now and at all times since April 1, 1911, have
 been stockholders in the defendant Arizona
 Mutual Savings and Loan Association and have
 paid into said Arizona Mutual Savings and Loan
 Association on account of the purchase price of
 their said stock the respective sums set opposite 213
 the names of each such stockholders as follows:

Ramon Brenna	\$ 180.00
Lysander Cassidy	250.00
	<hr/>
Total	\$ 430.00

III.

That each and all of the other petitioners here-
 inbefore named were, prior to April, 1911, stock-

214 holders in the defendant Arizona Mutual Savings and Loan Association, but since April, 1911, each of said persons have become and now are stockholders in the defendant Arizona Trust Company, and have paid in as a total to both of said companies the amounts set opposite the names of each of such stockholders respectively, as follows:

	C. R. Freeman	\$ 312.00
	M. A. Ramirez.....	216.00
	E. J. Brunenkant.....	111.00
	C. Brunenkant	90.00
	Thomas Weedin	132.00
	Frederick E. White.....	288.00
215	Frederick E. White assignee of Ah Lee..	255.00
	Sam Y. Barkley.....	150.00
	M. D. Langley	660.00
	Mrs. J. N. Russell.....
	Cora E. Dunagan.....	450.00
	Helen Weber	236.00
	W. E. Young.....	252.00
	Mrs. M. L. Graves.....	282.00
	Mrs. W. S. Hurst.....	282.00
	Mrs. C. S. Brown.....	300.00
	Maria B. Stevens.....	264.00
	A. T. Kleinschmidt.....	216.00
	Rosario C. Brenna.....	114.00
	A. J. Durago.....	312.00
216	H. Capin	75.00
	L. C. Frederick.....	156.00
	Gallin	96.00
	Total	\$5219.00

That each and all of your petitioners named in this petition both in Paragraph II and Paragraph III hereof desire to intervene in the above entitled cause in support of the allegations contained in the complainant's bill heretofore filed herein and in the first intervening petition filed herein on or

about July 15, 1912, to the end that the rights of 217
 your said petitioners and each of them in connection with each and all of the matters set forth in said complainant's bill and in said first intervening petition may be protected and may be submitted to the jurisdiction of this court, by it to be dealt with in accordance with law and equity and the rules and practice of this Honorable Court.

And in this connection, your said petitioners and each of them, in support of this their petition of intervention herein, beg leave to refer to and make a part thereof, as though set forth at length, each and every paragraph of complainant's bill of complaint herein, save and except so much of 218
 Paragraph Three thereof as relates exclusively to the complainant herein, and also, your said petitioners and each of them beg leave to adopt and make a part hereof, as though set forth at length herein each and every allegation and paragraph contained in the said first petition of intervention filed herein on or about July 15, 1912, except Paragraphs One, Two and Three of said first intervention petition, and each of your said petitioners hereby reaver and reallege, each for himself, as though set forth at length herein, each and every such allegation contained in said bill and in said first intervention petition, as though the same were set out at length herein; 219

WHEREFORE, your petitioners and each of them respectfully adopt and hereby pray in accordance with the form of complainant's bill herein, and further;

1. That they and each of them may be permitted to intervene in the above entitled cause and join in the prayer of the complainant therein.

2. Your petitioners and each of them, who are

220 stockholders in the defendant Arizona Trust Company, pray that the transaction whereby said petitioners assigned and transferred their stock in the defendant Arizona Mutual Savings and Loan Association for stock in the defendant Arizona Trust Company, may be rescinded and declared to be of no force and effect.

3. And that a restitution or reassignment to the said petitioners of the stock in the Arizona Mutual Savings and Loan Association so transferred by them, and each of them, to the defendant Trust Company be adjudged and decreed and that the cancellation of the certificates of stock
221 received by said petitioners from the said Trust Company as aforesaid may be ordered.

4. And that it be adjudged and determined that the transaction whereby your petitioners gave up their said stock in the defendant Loan Association for stock in the defendant Trust Company, is wholly void and of no effect.

5. And further that the defendant Trust Company be required to make complete restitution of all the properties heretofore received by it from the defendant Arizona Mutual Savings and Loan Association, together with the interest and income
222 thereon; and

6. That said restitution be made to the receiver which your petitioners pray this court to appoint for the purpose of preserving and taking into his possession all of the assets of both of said defendants.

And to the end that full and complete Justice and equity maybe done between all of the parties hereto and under the well-settled rule in equity in such cases provided, that where the court assumes jurisdiction of the matters in controversy for pur-

poses, and to the further end that by permitting your said petitioners to intervene herein and have their rights herein adjudged and determined by this Honorable Court, a multiplicity of suits against said defendant Trust Company may thereby be avoided, 223

7. That an accounting between both of said defendant companies be had, as well as an accounting between the said defendants and their respective stockholders. And that a master be appointed to take proofs of the facts herein alleged and to determine the rights and equities of all of the parties concerned therein, and that the affairs of both companies be wound up, the assets marshaled and distributed, and to whomsoever may be adjudged to be entitled thereto. 224

8. And that your petitioners have such other and further and different relief as to the court may seem meet and proper in the premises.

9. And together with the costs and disbursements in this action expended.

W. M. SEABURY,
Solicitor for Petitioners.
306 Fleming Building, Phoenix, Arizona.

UNITED STATES OF AMERICA,)
DISTRICT OF ARIZONA,) ss.
STATE OF ARIZONA,)
COUNTY OF MARICOPA.)

225

William M. Seabury, being duly sworn, says: That he is a solicitor of this court. That he is the solicitor for the petitioners above named. That he has read the foregoing petition and knows the contents thereof. That the allegations therein contained, as far as they relate to his own

223 acts, are true, and as far as they relate to the acts of others he believes them to be true. That in regard to all matters and things in the foregoing petition alleged which are not within the personal knowledge of this deponent, the deponent has been fully informed and he believes that the same are true. That the reason why this petition is not verified by the petitioners herein and is verified by the deponent, is that all of the said petitioners are absent from the county of Maricopa where deponent resides and are inaccessible to deponent, and by reason of the great number of petitioners interested herein it becomes and is impractical to have said petition verified by each of said petitioners in person. And that the facts in said petition alleged are peculiarly within the knowledge of deponent as obtained by him from examinations, personally conducted by him, of the records on file before the Arizona Corporation Commission in connection with the application of the Arizona Trust Company for a certificate authorizing it to transact business in the state of Arizona, and from all the testimony which deponent has heard relating to the subject matter herein involved, and from communications received by deponent from many other stockholders in the defendants above named and from other sources of information.

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W. M. SEABURY.

Subscribed and sworn to before me this 29th day of January, A. D. 1913.

(Seal)

JOS. S. JENCKES,
Notary Public.

My commission expires Feb. 16, 1916.

IN THE

District Court of the United States

FOR THE DISTRICT OF ARIZONA.

CHARLES W. CLARK,	}
Complainant,	
vs.	
ARIZONA MUTUAL SAVINGS	
AND LOAN ASSOCIATION,	
and the Arizona Trust Com-	}
pany,	
Defendants.	

In Equity.

No.

230

ANSWER.

Come now the defendants, the Arizona Mutual Savings and Loan Association and the Arizona Trust Company, and for answer to the several petitions in intervention herein, jointly and severally say:

I.

That they each of them severally deny that they or either of them, or that the officers or directors of either of them conspired and covenanted together for the purpose of doing any act to defraud or injure the interveners or any of them, or of any of the shareholders or creditors of either of the defendant corporations; and deny that they, or either of them, did in fact do any act which resulted in fraud or injury to any of them. 231

They jointly and severally deny that the Arizona Trust Company ever transferred or delivered to the defendant, the Arizona Mutual Savings and Loan Association, thirteen hundred

232 (1300) shares of the preferred stock of the defendant, the Arizona Trust Company, or of any of the preferred shares of the stock of the said defendant, directly or indirectly, otherwise than as hereinafter in this answer set out.

II.

Further answering the said petitions in intervention, the defendants jointly and severally say that on or about theday of October, 1899, the defendant, the Arizona Mutual Savings and Loan Association, became and was incorporated under the provisions of Chapter Five, Title XII, 233 Corporations, of Revised Statutes of the Territory of Arizona, 1887, and of the Acts amendatory thereof; that thereafter the said Arizona Mutual Savings and Loan Association adopted by-laws for the conduct of its business; that almost immediately after the date of its incorporation as aforesaid, the said Arizona Mutual Savings and Loan Association began the transaction of its business for the purpose for which it was organized, except that it did not at any time engage in the banking business, and continued the transaction of its business until as hereinafter set out; that said corporation is still in existence and exercising its corporate franchises for the 234 purpose of winding up its business, as hereinafter more fully disclosed;

That in the due course of its business the said Arizona Mutual Savings and Loan Association issued to divers persons, among them the interveners herein, certificates of the ownership of the several classes of stock which by its said articles of incorporation, its by-laws, and by resolutions of its board of directors, duly adopted from time to time, it was authorized to do;

That on or about the 11th day of April, 1911,

there were outstanding of said stock, including 235
 the stock owned or claimed by the interveners
 herein, stock of the attained or book value aggregating approximately One Hundred Thirty Thousand Dollars (\$130,000); that on said date, the said Arizona Mutual Savings and Loan Association was otherwise indebted for moneys borrowed by it and used in the due course of its business in the further sum of Twelve Thousand Dollars (\$12,000).

That prior to the said 11th day of April, 1911, the said Arizona Mutual Savings and Loan Association, in the due and regular course of its business, had loaned out upon real estate security and 236
 upon the shares of its capital stock, as it had a right to do under its articles of incorporation, by-laws, and the resolutions of its board of directors, all of the available funds of the Association, amounting on said date, together with the interest accumulated thereon, in the aggregate to the sum of about One Hundred Fifteen Thousand Dollars (\$115,000); that the said Arizona Mutual Savings and Loan Association also upon said date owned various pieces of real estate in the State of Arizona, which had theretofore been pledged to it to secure loans and which, because of the insolvency of the borrowers, it was required to take and did take, aggregating in value 237
 not to exceed, and which was estimated to be Fifteen Thousand Dollars (\$15,000); and these were all of the assets of the said Arizona Mutual Savings and Loan Association upon said 11th day of April, 1911; that the loans aforesaid made by the Arizona Mutual Savings and Loan Association were made for terms then having to run varying from one to seven years;

That by reason of business depressions which then prevailed and had prevailed for some time

238 in various parts of the State of Arizona where such loans had been made and where the real estate pledged to secure said loans was situated, many of the shareholders of the said Association defaulted in the payment of their dues to said Association and many of those to whom the money of said Association had been loaned as aforesaid upon real estate security failed to pay the interest accrued thereon and much of the real estate pledged to secure said loans had become materially depreciated in value, so that it became apparent that said Association could not discharge its indebtedness as it matured and its obligation to redeem and pay off its stock theretofore
239 issued as such stock should mature; that because of such business depression prevailing as aforesaid and for other causes unknown to the defendants, the business of the defendant, the Arizona Mutual Savings and Loan Association, had greatly diminished in volume, notwithstanding the diligent efforts of the manager and agents of said Association to maintain it; that by reason of such diminution of the value of new business and a failure of the efforts of the managers and agents of said Association to maintain it, the theretofore and usual current income of said Association gradually diminished and became inadequate to meet and discharge the obligations of
240 said Association upon its indebtedness and maturing stock; that the income of said Association consisted of dues agreed to be paid upon subscriptions for stock by the subscribers therefor, premiums upon loans, interest upon loans, fines imposed for delinquents, forfeitures because of default in payment for stock, and withdrawal fees; that the aggregate income of the Association from all sources had so diminished for the causes above stated, that the Association could neither continue its business except at a loss, nor could it meet its obligations to pay its indebtedness and

those arising out of the maturing of stock there- 241
tofore issued;

That at that time a large amount of the stock of the said Arizona Mutual Savings and Loan Association theretofore issued was maturing and becoming subject to redemption and payment by the Association; that none of the stock of the interveners herein had then matured, nor has it since matured, under the terms under which it was issued; that the assets of the Association, consisting as aforesaid of loans upon real estate, some having long terms to run, and others in the payment of which default had been made of both premiums and interest, and the real estate pledged 242 therefor depreciated in value, were not available under the corporate powers of the defendant, the Arizona Mutual Savings and Loan Association for use to pay off the indebtedness of the Association and to redeem and pay off the shares of the stock so maturing; that any attempt to realize on said assets would have resulted in a great loss to the Association and to its shareholders; that a dissolution of said Savings and Loan Association and an effort to realize upon its assets would have likewise resulted not only in great expense, but in a substantial loss to the shareholders and members of said Arizona Mutual Savings and Loan Association; 243

That it was thereupon resolved by the Board of Directors of the said Arizona Mutual Savings and Loan Association to submit to its members and stockholders a proposition to organize another and different corporation with other and larger and more comprehensive corporate powers, which new corporation, when organized, should take over all of the assets of the said Arizona Mutual Savings and Loan Association and so handle and otherwise treat the assets thereof

- 244 that the largest amount might be realized there-
 from for the use and benefit of the shareholders
 and creditors of the said Arizona Mutual Sav-
 ings and Loan Association. It was believed that
 by such a plan an amount could be realized from
 said assets sufficient to pay to the stockholders of
 the said Association the then attained or book
 value of their stock in said Association; that for
 that purpose, it was contemplated that such of
 the stockholders of the said Arizona Mutual Sav-
 ings and Loan Association who shall elect to ex-
 change the attained or book value of their shares,
 whether matured or not, in the Association for
 an equivalent value at par of the preferred stock
 245 of the proposed new corporation might do so, and
 that those of the shareholders of the Arizona Mu-
 tual Savings and Loan Association who would
 not elect to exchange their shares as aforesaid
 in the said Arizona Mutual Savings and Loan
 Association for an equivalent amount at par of
 the stock of the proposed new corporation should
 be paid by the new corporation the attained or
 book value thereof;

That accordingly the Board of Directors of the
 said Arizona Mutual Savings and Loan Associa-
 tion caused to be organized and incorporated
 under the laws of the Territory of Arizona the
 246 Arizona Trust Company, one of the defendants
 herein; that said defendant, the Arizona Trust
 Company, is now doing business under the
 authority and license as provided by the laws of
 the State of Arizona;

That thereupon plans were attempted to be de-
 vised whereby preferred shares of the Arizona
 Trust Company might be exchanged at par for
 the stock of the Arizona Mutual Savings and
 Loan Association; that for that purpose thirteen
 hundred (1300) shares of the par value of One

Hundred Thirty Thousand Dollars (\$130,000) 247
of the preferred stock of the said Arizona Trust
Company were set aside and segregated and de-
signed to be used for the purpose of such ex-
change; that in fact, said thirteen hundred (1300)
shares of said preferred stock were never issued
or delivered to the said Arizona Mutual Savings
and Loan Association; that pending the efforts
to effect the exchange aforesaid the holders of
the stock of the Arizona Mutual Savings and
Loan Association, aggregating an attained or
book value thereof approximating Seventy thou-
sand Dollars (\$70,000), exchanged the same for
preferred stock of the said Arizona Trust Com-
pany and assigned and transferred their stock in 248
said Savings and Loan Association to the Ari-
zona Trust Company; that others of the stock-
holders of the said Arizona Mutual Savings and
Loan Association, for value paid to them by the
said Arizona Trust Company, assigned their
stock of the aggregate attained or book value of
approximately Thirty-two Thousand Dollars
(\$32,000) to the said Arizona Trust Company,
so that on the 28th day of May, 1912, there were
outstanding of the stock of the said Arizona Mu-
tual Savings and Loan Association in the hands
of the stockholders thereof, other than the said
Arizona Trust Company, stock of the attained or
book value of Twenty-seven Thousand, Nine 249
Hundred Seventy-three and 93-100 Dollars
(\$27,973.93), of which stock that of the inter-
veners alleging themselves yet to be stockhold-
ers of the said Savings and Loan Association, is
a part; that as and part of an agreement between
the Arizona Trust Company and the said Arizona
Mutual Savings and Loan Association, the Ari-
zona Trust Company assumed to pay the indebt-
edness of the said Arizona Mutual Savings and
Loan Association other than that due stockhold-
ers on account of their stock subscriptions,

250 amounting, as aforesaid, to about Twelve Thousand Dollars (\$12,000); that in consideration of the premises the Arizona Mutual Savings and Loan Association had assigned and transferred or caused to be assigned and transferred to the Arizona Trust Company all of its assets hereinbefore enumerated; that on the said 28th day of May, 1912, there being outstanding as aforesaid of the stock of the said Arizona Mutual Savings and Loan Association, other than stock theretofore assigned and transferred to the said Arizona Trust Company the sum of Twenty-seven Thousand, Nine Hundred Seventy-three and 93-100 Dollars (\$27,973.93), the said Arizona
251 Trust Company and the said Savings and Loan Association deposited with William McNeff, the then and still the President of the said Arizona Mutual Savings and Loan Association, Thirty Thousand Dollars (\$30,000) in value, secured by notes and mortgages on real estate theretofore as aforesaid assigned by the said Arizona Mutual Savings and Loan Association to the said Arizona Trust Company, to be held in trust by the said McNeff, President of the said Arizona Mutual Savings and Loan Association as aforesaid to secure to the holders thereof the payment of the attained or book value of the stock of the
252 said Arizona Mutual Savings and Loan Association held by others than the said Arizona Trust Company, among them as aforesaid, the stock of the interveners herein, who allege themselves still to be the owners thereof; that said notes and mortgages are of greater value than the attained or book value of said outstanding stock; that the said McNeff then took the exclusive control of the said notes and mortgages aforesaid for the purposes aforesaid, and has held the same ever since, except that the amount thereof has been reduced from time to time as the liabilities upon outstanding shares of the stock of the said Loan Associa-

tion have been paid and discharged or said stock 253
 has been assigned to the said Arizona Trust Com-
 pany, until the amount of said notes and mort-
 gages was reduced at the time the receiver here-
 tofore appointed herein took possession thereof,
 but that the amount and value thereof was never
 reduced below the attained or book value of the
 outstanding stock of the Arizona Mutual Sav-
 ings and Loan Association; that the defendant
 the Arizona Trust Company is now the owner of
 about ninety per cent (90%) of the entire out-
 standing stock of the said Savings and Loan
 Association, and as such owner of said stock is
 and has been the equitable owner of a like pro-
 portion of all of the assets of the said Arizona 254
 Mutual Savings and Loan Association;

And defendants deny that any of the interven-
 ers who exchanged their stock in the said Ari-
 zona Mutual Savings and Loan Association for
 stock in the Arizona Trust Company were in-
 duced to do so by any false or fraudulent misrep-
 resentations made to them by either of the de-
 fendants, either to the effect that in April, 1911,
 One Hundred Thirty Thousand Dollars (\$130,-
 000) worth of the assets of the Arizona Mutual
 Savings and Loan Association had been in fact
 lawfully transferred to and had become the prop-
 erty of the defendant Arizona Trust Company, 255
 or that if the said interveners would surrender
 their stock in the defendant Arizona Mutual Sav-
 ings and Loan Association in exchange for pre-
 ferred stock in the defendant Arizona Trust Com-
 pany that they would receive rights, privileges
 and benefits in the Arizona Trust Company which
 were the same as and identical with the rights,
 privileges and benefits which they had enjoyed
 as stockholders in the said Arizona Mutual Sav-
 ings and Loan Association, or that as and when
 the said defendant Trust Company acquired the

256 assets of the defendant Arizona Mutual Savings and Loan Association, the said defendant Trust Company would continue to care for the investment of the interveners who exchanged their stock in the Arizona Mutual Savings and Loan Association for the stock in the Arizona Trust Company without charge or expense against them, and they deny that they made any such representations or substantially any such representations; they deny that since April, 1911, the defendant Arizona Trust Company has charged the expense of operating and maintaining the said defendant Trust Company against the Arizona Mutual Savings and Loan Association and the
 257 assets thereof.

And defendants further deny that since its organization, the management of the affairs of said Arizona Trust Company has been wasteful, extravagant, dishonest or incompetent.

KIBBEY, BENNETT & BENNETT,
 Attorneys for Defendants.

STATE OF ARIZONA, }
 COUNTY OF MARICOPA. } ss.

258 John T. Dunlap, being duly sworn, upon his oath, deposes and says: That he is Treasurer of the defendant corporation, the Arizona Trust Company; that he has read the foregoing answer and that the facts therein stated are true, as he verily believes.

JOHN T. DUNLAP.

Subscribed and sworn to before me this 23rd day of November, 1912.

B. L. RUDDEROW,
 Notary Public.

(My commission expires Sept. 26, 1916.)

STATE OF ARIZONA, }
 COUNTY OF MARICOPA. } ss.

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J. C. Reid, being duly sworn, upon his oath, deposes and says: That he is Vice-President of the defendant corporation, Arizona Mutual Savings and Loan Association; that he has read the foregoing answer and that the facts therein stated are true, as he verily believes.

J. C. REID,

Subscribed and sworn to before me this 23rd day of November, 1912.

B. L. RUDDEROW,
 Notary Public.

260

(My commission expires Sept. 26, 1916.)

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EXHIBIT 7.

IN THE

District Court of the United States
 FOR THE DISTRICT OF ARIZONA.

CHARLES W. CLARK,
 Complainant,
 vs.
 ARIZONA MUTUAL SAVINGS
 AND LOAN ASSOCIATION,
 and the Arizona Trust Com-
 pany,
 Defendants.

263

REPLICATION.

And now comes each and all of the interveners herein and replying to the answer filed herein, say:

That saving and reserving all manner of exceptions to the insufficiency of the answer for replication thereto, doth say that the complainants' bill and the bill of each and all of the interveners herein is true and sufficient as averred and that each of said interveners is ready to prove it, and that the answer of the defendants is untrue and insufficient.

264

WHEREFORE, each of said interveners pray relief as set forth in the complainants' bill of complaint and in the respective bills in intervention herein.

W. M. SEABURY,
 Solicitor for Intervenors.

IN THE

District Court of the United States

FOR THE DISTRICT OF ARIZONA.

CHARLES W. CLARK,	}
Complainant,	
vs.	
ARIZONA MUTUAL SAVINGS	
AND LOAN ASSOCIATION,	
and the Arizona Trust Com-	}
pany,	
Defendants.	

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FINAL DECREE.

This cause came on to be heard at this term of the Court, and, after hearing the witnesses and receiving the evidence offered in support of the claims of the interveners herein and after hearing counsel for the interveners and counsel for the defendants as to the final decree to be entered herein, and upon a full consideration thereof, it was ordered, adjudged and decreed, as follows:

FIRST: That the persons hereinafter named in this paragraph are interveners in the above entitled cause who are still stockholders in the defendant Arizona Mutual Savings and Loan Association, and, as such, have paid in to said defendant Arizona Mutual Savings and Loan Association the following sums set opposite the names of each:

John Dennett, Jr.....	\$ 352.00	267
J. G. Bogard.....	180.00	
J. J. Keating.....	36.00	

268	Rose Boehmer	360.00
	Mary Bleak	72.00
	Harry E. Harter.....	168.00
	H. S. Gray.....	570.00
	Mary E. Ellsworth.....	891.78
	L. M. Gustafson.....	500.00
	A. H. Ferrin.....	288.00
	Lucy H. Purdum.....	144.00
	H. P. Wightman.....	450.00
	A. C. Lockwood.....	472.00
	Alex Anderson	675.00
	D. Bohn	600.00
	Erit Equist	450.00
	A. H. Oeltjen.....	252.00
269	George S. Hughes.....	288.00
	Mrs. W. J. Jackson.....	144.00
	Lysander Cassidy	307.00
	Ramon Brenna	180.00

SECOND: That the persons hereinafter named in this paragraph are interveners herein who were formerly stockholders in the defendant Arizona Mutual Savings and Loan Association, but who have exchanged their stock in the defendant Loan Association for stock in the defendant Arizona Trust Company, and that said persons are hereinafter referred to as "exchanging stockholders" in the defendant Loan Association, and that each of the persons named in this paragraph have heretofore paid in to the defendant Loan Association or to the defendant Trust Company the following sums set opposite the names of each:

Ross H. Blakely.....	\$ 72.00
John W. Harris, Jr.....	126.00
A. E. Morcom.....	450.00
Fred W. Albright.....	60.00
M. Kirshwing	474.00
Olaf Olsen	266.44

Theo. Holten and Ole Holten.....	256.43	271
Hugo Sandquist	1,049.33	
Eugene Seeley	558.21	
James H. East.....	351.21	
Fred Cadwell	352.67	
Margaret Cadwell	1,211.98	
E. B. Tinker.....	312.00	
E. L. Hosler.....	390.00	
S. L. Hosler.....	264.00	
Glenn W. Morſe.....	324.00	
B. G. Tang Fong.....	192.00	
A. E. Gillard.....	504.00	
J. C. Wilhelm.....	210.00	
Frank A. Moss.....	252.00	
Geo. K. Anderson.....	504.00	272
L. D. LaChance.....	180.00	
Grace Langston	600.00	
Frank A. Flickinger.....	280.00	
Charles J. Patterson.....	270.00	
E. T. Staebler.....	458.00	
Nettie Sheldon	282.00	
Lloyd C. Henning.....	210.00	
Wilson Patterson	264.00	
E. W. Clayton.....	864.00	
William C. Faulkner.....	1,000.00	
Walter W. Williams.....	402.00	
J. N. Stratton.....	204.00	
W. E. Platt.....	204.00	
John F. Weber.....	192.00	273
S. G. Ijams.....	300.00	
Ida N. Frye.....	600.00	
William Sobey	318.00	
William Whalley	318.00	
O. W. Miller.....	354.00	
William H. Watts.....	1,680.00	
Globe Lumber Co.....	899.10	
Alfred Hansen	552.00	
Clara F. Bloom, nee Clara Ferrin.....	318.00	
Orville Young	204.00	
Fred W. Horn.....	285.00	

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274	J. C. Bradley.....	300.00
	Oliver Myers	180.00
	J. W. McLean.....	600.00
	Joseph Carpenter	216.00
	John Steigler	696.00
	C. R. Freeman.....	312.00
	M. A. Ramirez.....	216.00
	E. J. Brunenkant.....	111.00
	C. Brunenkant	90.00
	Thomas Weedon	132.00
	Frederick E. White.....	288.00
	Frederick E. White, Assignee of Ah Lee	225.00
	Sam Y. Barkley.....	150.00
	M. D. Langley.....	660.00
275	Mrs. J. N. Russell.....	374.38
	Cora E. Dunagan.....	450.00
	Helen Weber	236.00
	W. E. Young.....	252.00
	Mrs. M. L. Graves.....	297.36
	Mrs. W. S. Hurst.....	297.53
	Mrs. C. S. Brown.....	318.45
	Maria B. Stevens.....	290.04
	A. T. Kleinschmidt.....	233.40
	Rosaria C. Brena.....	114.00
	A. J. Durago.....	312.00
	H. Capin	75.00
	L. C. Frederico.....	156.00
276	E. T. Collins.....	96.00

THIRD: That heretofore and in or about the month of March, 1911, the defendant Arizona Trust Company was, by those in control of the defendant Arizona Mutual Savings and Loan Association cause to be organized; and that at or about said time the defendant Loan Association was insolvent and unable to meet its obligations to its stockholders as said obligations were accruing, and that the purpose of the organization of the defendant Trust Company was to take over the assets and properties of said defendant

Loan Association, and to engage in the business of conducting and maintaining the said defendant Trust Company. 277

FOURTH: That as to the interveners herein and other non-consenting stockholders in the defendant Loan Association, who had never transferred their stock therein for stock in the defendant Trust Company, the said proposed transfer of the assets and properties of the defendant Loan Association to the defendant Trust Company was unlawful and invalid and not binding upon the interveners herein or upon the other outstanding and non-exchanging stockholders in the defendant Loan Association. 278

FIFTH: That pursuant to such purpose, all of the assets and properties of the defendant Loan Association were subsequently transferred to the defendant Trust Company, since which time the defendant Trust Company and its officers have dealt with the said assets and properties as though owned by the defendant Trust Company and have confused and inseparably mingled the assets derived from the defendant Loan Association with the assets of the defendant Trust Company, and that at this time it is impracticable and impossible in justice to the parties hereto to direct and enforce a re-transfer of all of the original properties and assets so derived by the defendant Trust Company, and the profits thereon, from the defendant Loan Association to said last named Company or the receiver of said Company. 279

SIXTH: That all of the interveners above named, described herein as "exchanging stockholders" in the defendant Loan Association, were induced to exchange their stock in the defendant Loan Association for stock in the said defendant Trust Company in reliance upon representations

280 theretofore made to them in the printed literature of one or both defendants and by verbal statements made to them by the representative of the defendants, and that such representations were in fact false and were known by the defendants to be false when made, and induced the said interveners to make the exchange of their said stock as aforesaid; in consequence whereof, the Court decrees that the said interveners named herein as exchanging stockholders in the defendant Loan Association be, and each of them hereby is, allowed and permitted to rescind the said exchange of their stock; and it is hereby ordered and decreed that each of said "exchanging stockholders" be, and they hereby are, restored to their original position and status as stockholders of the defendant Loan Association, and each of said "exchanging stockholders" is hereby deprived of his status of a stockholder in the defendant Trust Company.

SEVENTH: And to the end that the rights of all of the interveners herein and of the outstanding stockholders in the defendant Loan Association who never exchanged their stock therein for stock in the defendant Trust Company may be adequately preserved and protected, the Court hereby confirms the sale and transfer of all of the 282 assets of the defendant Loan Association to the defendant Trust Company, and adjudges that complete title is vested in the defendant Trust Company of, in and to all of the assets and properties of whatsoever kind or nature heretofore owned by the defendant Loan Association, subject only to the lien and charges hereinafter specified.

EIGHTH: And for the further protection of the rights of the said interveners and the said stockholders in the defendant Loan Association

who never exchanged their stock therein for stock in the defendant Trust Company, the Court adjudges and determines that all of the assets and properties now or hereafter owned or acquired by the defendant Trust Company be, and they hereby are, impressed with the trust and lien in favor of each of the said interveners named herein to the extent and amount set opposite the names of each, and in favor of the stockholders in the defendant Loan Association who never exchanged their stock therein for stock in the Trust Company for the amounts heretofore paid in by such last named persons in the following names and amounts:

		283
S. Arneson	\$3,349.10	
Mrs. H. C. Bagge.....	321.96	
A. M. Baker.....	238.00	
A. Barrasa	82.00	
Ed. Barry	140.00	
H. L. Bedford.....	185.00	
L. Bejarano	100.00	
A. C. Bittick.....	114.00	
R. R. Brenz.....	523.48	
D. A. Burke.....	360.00	
A. E. Carillo.....	314.86	
D. H. Butris.....	165.00	
W. H. Caruthers.....	300.00	
R. F. Chamberlain.....	78.00	285
D. P. Clanton.....	100.00	
T. N. Clanton.....	112.00	
J. S. Clark.....	174.00	
S. B. Lucas.....	902.00	
E. J. Doyle.....	96.00	
A. J. Durazo.....	242.00	
Mrs. L. C. Earle.....	84.00	
Miss V. Espionzo.....	168.00	
A. H. Ferrier.....	296.00	
C. Hagerland	911.65	
J. R. Hampton	77.00	

286	Wade Hampton	541.06
	C. F. Holdsworth.....	637.80
	D. P. Jones.....	98.00
	H. A. Kendall.....	71.00
	A. Maurino	950.00
	C. Monroe	112.00
	E. Morales	109.00
	Mrs. L. R. Morris.....	297.90
	F. E. Murphey.....	327.72
	Jennie McCarthy	570.00
	W. W. McNeff.....	130.00
	Ida Patterson	79.43
	J. S. Patten.....	956.70
	C. Purtyman	108.96
287	C. Purtyman	175.70
	G. R. Robinette.....	156.00
	A. D. Rosecrans.....	551.86
	T. A. Sanders.....	350.00
	A. D. Rosecrans.....	192.00
	Short and Ward.....	112.00
	Short and Ward.....	93.00
	J. C. Simmons.....	234.84
	A. K. Snider.....	114.00
	B. D. Snider.....	114.00
	M. M. Stacy.....	114.00
	R. W. Sturgis.....	516.64
	J. H. Thompson.....	1,019.43
	J. Barragan	101.00
288	J. Wagner	124.59
	Mrs. E. Widner.....	405.16
	A. Millett	989.00
	M. Potter	1,089.65
	A. H. Hammer.....	370.00
	Wade Hampton	406.73

NINTH: And to effectuate this decree and to enable it expeditiously and economically to be carried into full force and effect, the Court directs George D. Christy, Esq., as the temporary receiver of the defendant Loan Association, hereto-

fore duly appointed, to account to the Court and 289
to surrender and deliver to the permanent receiver of the defendant Trust Company, hereinafter named, all of the assets and property of whatsoever kind or nature which have heretofore come into his hands as such receiver; and it is adjudged and decreed that the accounts of said receiver presented simultaneously herewith are passed and adjudged to be in all things correct, and the bond of said receiver is hereby cancelled and the sureties thereon exonerated from further liability thereon; and the Court discharges the said George D. Christy, Esq., as receiver of the defendant Loan Association and from all further responsibility and liability arising out of said receivership; and it appearing to the Court's satisfaction that the said George D. Christy, Esq., as receiver, has fully and faithfully discharged the duties of his trust, and in connection therewith it has been necessary for the said receiver to retain counsel, and that, by reason of such necessity, said receiver has retained Messrs. Chalmers and Kent as his counsel, which counsel have rendered substantial and valuable services to the said receiver in the conservation and preservation of the estate of which the said George D. Christy, Esq., was receiver; and it appearing to the Court's satisfaction that counsel for the interveners herein has rendered substantial services of 290
value to all of the interveners and to all of the stockholders of the defendant Loan Association, named in the preceding paragraph, and that said services have resulted in the production of a fund in Court consisting of the assets of the said defendant Loan Association and of the assets of the said defendant Trust Company for the benefit of the said interveners named herein and for the benefit of the stockholders of the defendant Loan Association, named in the preceding paragraph, and the cause being one of extraordinary and 291

292 exceptional difficulty and the Court being fully advised by proof of the value of the services rendered; now, therefore, in accordance with the usual practice of the Court in such cases, the Court fixes the allowances of the said George D. Christy, Esq., as receiver, and of his counsel, and of the counsel for the interveners herein, as follows:

To George D. Christy, Esq., for services rendered as aforesaid, Twelve Hundred and Fifty Dollars (\$1,250.00);

293 To Messrs. Chamlers and Kent, for services rendered as counsel for said receiver, Twelve Hundred and Fifty Dollars (\$1,250.00);

To the interveners above named, upon account of the services rendered to them in this proceeding by their counsel, William M. Seabury, Three Thousand, Three Hundred and Seventy-six and 6-100 Dollars (\$3,376.06).

294 And the Court further directs the permanent receiver, hereinafter named, to pay the items appearing upon the account of George D. Christy, Esq., as receiver of the defendant Loan Association, which are unpaid and which are hereby allowed.

TENTH: And the Court hereby appoints Sims Ely, Esq., as permanent receiver of the defendant Arizona Mutual Savings and Loan Association and of the defendant Arizona Trust Company; and the said Sims Ely, Esq., having duly presented his accounts as temporary receiver of the defendant Trust Company, and the said accounts are hereby passed and allowed; and the fees of the said Sims Ely, Esq., as temporary receiver, are hereby fixed in the sum of Seven Hundred and

Fifty Dollars (\$750.00); and it appearing to the Court's satisfaction that the said receiver has necessarily employed Clyde M. Gandy, Esq., as counsel, and that he has rendered substantial services to the said temporary receiver in aid of said receiver, the compensation of the said Clyde M. Gandy, Esq., for services rendered to the said Sims Ely, Esq., as temporary receiver, is hereby fixed in the sum of Seven Hundred and Fifty Dollars (\$750.00); and full power and authority is hereby conferred upon the said Sims Ely, Esq., as permanent receiver, to do and perform all such acts as may be necessary and proper to be done by a permanent receiver, in accordance with the usual practice of this Court in such and similar cases; and the said receiver is hereby directed to sell at public or private sale and upon such terms as to the said receiver may seem proper, but subject to the future ratification and confirmation of the Court, so much or the whole of the assets and properties of the defendant Trust Company as may be necessary first to pay and discharge the allowances heretofore made as the costs of administration of the insolvent estate of the said defendant Loan Association, and thereafter to discharge and pay the costs and expenses incident to the administration of the estate of the said defendant Trust Company, including the allowance hereafter to be made to the said Sims Ely, Esq., as permanent receiver and to his counsel in the premises, and that thereafter he pay pro rata in equal shares to each and all of the interveners herein and to the stockholders of the defendant Loan Association, named in the preceding eighth paragraph, such sums of money as may be received by such permanent receiver until the said interveners and the said non-exchanging Loan Association stockholders, named in the preceding eighth paragraph, are paid in full the amounts set opposite their respective names herein; and

298 that the said receiver pay the balance remaining thereafter, if any, in his hands to the defendant Trust Company for the benefit of such persons as may be lawfully entitled thereto.

ELEVENTH: And the Court hereby vests the said Sims Ely, Esq., as permanent receiver, with all the rights, title, benefits and privileges heretofore existing in the defendant Arizona Mutual Savings and Loan Association and in the said George D. Christy, Esq., as temporary receiver thereof, with full power to said permanent receiver to be substituted in his capacity as permanent receiver of the defendant Arizona Mutual
 299 Savings and Loan Association or as permanent receiver of the defendant Arizona Trust Company, or both, in any and all litigation in which the defendant Loan Association, or the said George D. Christy, Esq., as temporary receiver thereof, or in which the defendant Trust Company, or the said Sims Ely, Esq., as temporary receiver thereof, may be a party, or in which the said defendant Loan Association, or said George D. Christy, Esq., as temporary receiver may have an interest; and full power and authority is hereby given to said Sims Ely, Esq., as permanent receiver, to employ and compensate, as in his judgment may seem proper, such counsel, or other
 300 assistants and employees as in the judgment of the said Sims Ely, Esq., as permanent receiver, may be for the benefit of the estate of which the said Sims Ely, Esq., is hereby appointed permanent receiver.

TWELFTH: And any and all persons having any property or assets of either defendant are hereby directed to deliver forthwith to the said Sims Ely, Esq., as permanent receiver of the defendants above named, all such property or assets in which either or both defendants have or claim

to have an interest; and the said defendants, and 301
 each of them, and all of the officers, directors,
 agents and representatives of the said defendants,
 and all persons claiming from, through or under
 them, or either of them, are hereby enjoined and
 restrained from in any way disposing of any of
 the properties of the defendants above named, or
 either of them, and from interfering or in any
 way embarrassing the said receiver in the per-
 formance of his said duties.

Done in open Court, this 27th day of Febru-
 ary, 1913.

RICHARD E. SLOAN, 302
 United States District Judge.

304

EXHIBIT 9.

IN THE

District Court of the United States

FOR THE DISTRICT OF ARIZONA.

CHARLES W. CLARK,

Complainant,

vs.

ARIZONA MUTUAL SAVINGS

AND LOAN ASSOCIATION,

and the Arizona Trust Com-

305

pany,

Defendants.

In Equity.

No.

The petition of J. L. Waring, C. T. Wise, Frank Pister, Mrs. C. F. Richardson, Mrs. Lulu Y. Carruthers, Daniel Hibbard, G. E. Phelps, Lesuer & Co., J. H. Barnett, R. N. Stapley, C. H. Schulz, R. W. Wagoner, Frank W. Smake, Thomas A. Rickel, Fred Hensing, Mrs. Margaret Babbott, David B. Lovell, J. W. Francis, C. I. Smith, August P. New, Edgar A. Brown, Martin F. Taylor, August Johnson, John T. Steinmetz, August Schwalbe, Irving Devry, Inocente Morales, Oscar Emerson, Mrs. Stella Wade, John F. Klock, F. W. Smith, Chas. Kohn, N. G. Fang Fong, A. E. Gillord, Mrs. Maude Webster, intervening petitioners herein, through their attorney and solicitor Benton Dick, respectfully allege and show to this Honorable Court:

I.

That heretofore, and on July 15th, 1912, there was filed in this Honorable Court a bill of complaint in equity wherein one Charles W. Clark was complainant and the Arizona Mutual Sav-

ings & Loan Association and the Arizona Trust Company were defendants; that said suit was brought by the complainant above named, on behalf of himself and all others similarly situated as stockholders in the defendant, the Arizona Mutual Savings & Loan Association for the relief prayed for in said bill of complaint and that the final decree in said cause was entered on the 27th day of February, 1913, as hereinafter set forth. 307

II.

That all of your petitioners, except John Wagner, have been stockholders in the Arizona Trust Company since about the 1st day of May, 1912, and that your petitioner, John Wagner, has been a stockholder in the Arizona Mutual Savings and Loan Association since about the 1st day of April, 1911. 308

III.

That your petitioners desire to intervene in the above entitled cause in support of the allegations contained in complainant's bill heretofore filed herein and in support of the allegations in this petition to the end that the rights of your petitioners and each of them, in connection with each and all of the matters set forth in said complainant's bill and said petition, may be submitted to the jurisdiction of this Court, by it to be dealt with in accordance with law and equity and the rules and practice of this Honorable Court and in this connection your petitioners in support of this, their petition for leave to intervene herein, refer to and beg leave to make a part hereof, each and every paragraph of complainant's bill of complaint herein, insofar as the same may be applicable to the case of your petitioners. 309

That in addition to the matters set forth by reference to complainant's bill as aforesaid, your petitioners herein, who are stockholders in the defendant Arizona Trust Company as aforesaid, allege that heretofore each of said stockholders was a stockholder in the defendant Arizona Mutual Savings and Loan Association and as such entitled to all the rights and privileges of such stockholder in and to their proportionate shares of the assets and properties of the said Arizona Mutual Savings & Loan Association. That at various times subsequent to April, 1911, your pe-
311 tioners were induced to surrender their stock in the Arizona Mutual Savings and Loan Association, by the false and fraudulent representations made to them by the Arizona Trust Company and the Arizona Mutual Savings and Loan Association.

V.

That on the 27th day of February, 1913, a final decree was entered in the above entitled cause in which it was adjudged that certain intervening stockholders in the Arizona Mutual Savings and Loan Association, and the Arizona Trust Company should receive the sums opposite their re-
312 spective names in said decree, which said decree is by reference made a part thereof, that none of your petitioners were mentioned in said decree, that no notice was given petitioners of any pending suit, that petitioners, until the present time, were unaware that said companies were insolvent or that any suit was pending and that their rights were not protected; that the rights of petitioners have not been determined, and that unless said decree is set aside the rights of petitioners will not be protected for the reasons hereinafter set forth.

That under and by virtue of the decree hereinbefore mentioned, Mr. Sims Ely is named as permanent receiver and was ordered that all assets of the Arizona Mutual Savings & Loan Association and the Arizona Trust Company be turned over to him, but said decree and order so made as aforesaid did not require said receiver to give bond in any sum whatever and that the said receiver was not nor is under bond.

VII.

That said decree is so broad in its scope that almost unlimited powers are conferred upon said receiver and no restrictions except such as are ordinarily inferred or implied from the nature of the trust, are placed upon him in the matter of disposing of the assets and creating debts in the way of expenses and that unless said decree is set aside or modified and said petitioners are allowed to intervene and said receiver restrained, the assets of said defendant Companies will be dissipated and your petitioners will sustain irreparable losses. 314

VIII.

That since the appointment of Sims Ely, so appointed permanent receiver as aforesaid, said receiver has been and is wholly impotent so far as protecting and safe-guarding the interests of your petitioners is concerned; that said receiver has not devoted his personal time to the business of the defendant Companies, that he has not personally inspected the property or assets of said Companies nor caused an accounting to be made of the same, that said receiver has not only paid large fees as allowed by the Court in said decree,

316 but since said decree was entered he has expended large sums of money and is continuing to expend large sums of money and to make disbursements without any order or authority of this Court, that your petitioners are informed and believe and therefore state the fact to be that said receiver is about to dispose of large parcels of the real estate of the defendant Companies at a price wholly inadequate, that said receiver is not familiar with the line of business in which his duties require him to engage, that he is grossly unfit and incompetent to act as receiver of the said defendant Companies.

317

IX.

Your petitioners further aver that on the 19th day of March, 1913, said Sims Ely, receiver as aforesaid, entered into an agreement of sale with one J. W. Walker, whereby said receiver agreed to dispose of certain real estate to the said J. W. Walker, and that one W. T. Smith, guaranteed or attempted to guarantee the performance by the said Walker, as aforesaid, is the identical W. T. Smith who was president of the
 for some months prior to the time that receivership proceedings were instituted, and who was largely responsible for the failure and
 318 insolvency of the said Company and that the said J. W. Walker has been for a number of years, and still is closely associated with the said Smith in different business transactions, and that your petitioners verily believe that the object of making said agreement for the sale of said property was to enable the said Smith to cover up former transactions which were detrimental to the best interests of the stockholders; that since the said Smith has ceased to be an officer of the said Company, and during the different stages of receivership of the said Arizona Mutual Savings and

Loan Association and the Arizona Trust Com- 319
 pany, the said Smith, and the said Walker have
 dominated and controlled the affairs of said Com-
 panies and that they do now dominate and control
 the affairs of said Companies and to dictate the
 policy of the receiver, that the receiver well
 knows, or should know, that the price agreed to
 be paid by the said Walker, for the said property
 is less than one-half of its actual value and that
 your petitioners verily believe, and therefore state
 the fact to be, that there is collusion between the
 said Smith and the said Walker, whereby Walker
 is to purchase the said property for a sum much
 less than its actual value.

320

X.

That the sums which the receiver is authorized
 to pay to the various intervening stockholders in
 the Arizona Mutual Savings & Loan Association
 and the Arizona Trust Company, under and by
 virtue of the decree as aforesaid, nearly equal the
 present available assets of the said Companies
 and if the sale from the said receiver to the said
 Walker is consummated all of the available
 assets will have been consumed; that your peti-
 tioners have received nothing under and by virtue
 of the aforesaid decree, notwithstanding the
 money invested by them in said Companies has 321
 been used and is still being used to pay the fees
 and expenses of the receiver and the proceedings
 incident to the receivership proceedings.

Your petitioners further aver that unless the
 contract between the said receiver and the said
 Walker is rescinded and unless the aforesaid de-
 cree is set aside, they will sustain a total loss of
 all the money invested in said Companies and
 that they will not receive their proportionate share
 of the assets of said Companies nor any thereof.

That the said Arizona Mutual Savings and Loan Association and the said Arizona Trust Company are wholly insolvent and unable to meet and discharge the various obligations assumed by said Companies and that your petitioners have no other adequate remedy at law to redress the wrongs and grievances herein set forth, except in a court of equity, and in the above entitled cause.

WHEREFORE, your petitioners, and each of them, respectfully pray this Honorable Court:

323 FIRST. That they and each of them may be permitted to intervene in the above entitled cause and join in the prayer of the complaint therein.

SECOND. That the final decree entered in the above entitled action on the 27th day of February, 1913, be set aside and held for naught and that the said case be re-opened and that petitioners be allowed to intervene to the end that their rights may be protected.

THIRD. That the order of Court, if any there was, granted confirming the agreement of sale between the receiver and J. W. Walker, be vacated and that the receiver be ordered to rescind said
324 agreement.

FOURTH. Your petitioners, who are stockholders in the defendant Arizona Trust Company, pray that the transaction whereby said petitioners assigned and transferred their stock in the defendant Arizona Mutual Savings and Loan Association for stock in the defendant Arizona Trust Company, may be rescinded and declared to be of no force and effect.

FIFTH. And that a restitution or re-assign-

ment to the said petitioners of the stock in the 325
 Arizona Mutual Savings and Loan Association
 so transferred by them, and each of them, to the
 defendant Trust Company be adjudged and de-
 creed and that the cancellation of the certificates
 of stock received by said petitioners from the said
 Trust Company as aforesaid may be ordered.

SIXTH. And that it be adjudged and deter-
 mined that the transaction whereby your peti-
 tioners gave up their said stock in the defendant
 Loan Association for stock in the defendant Trust
 Company, is wholly void and of no effect.

SEVENTH. And further that the defendant 326
 Trust Company be required to make complete res-
 titution of all of the properties heretofore received
 by it from the defendant Arizona Mutual Sav-
 ings and Loan Association, together with the in-
 terest and income thereon; and

EIGHT. That said restitution be made to the
 receiver and which your petitioners pray this
 Court be appointed for the purpose of preserving
 and taking into his possession all of the assets of
 both of said defendants.

And to the end that full and complete justice
 and equity may be done between all of the parties
 hereto and under the well settled rule in equity 327
 in such cases provided, that where the Court as-
 sumes jurisdiction of the matters in controversy
 for one purpose, such jurisdiction will be exer-
 cised for all purposes, and to the further end that
 by permitting your said petitioners to intervene
 herein and have their rights herein adjudged and
 determined by this Honorable Court, a multiplic-
 ity of suits against said defendant Trust Company
 may thereby be avoided.

NINTH. That an accounting between both of

328 the said defendant Companies be had, as well as an accounting between the said defendants and their respective stockholders. And that a master be appointed to take proofs of the facts herein alleged and to determine the rights and equities of all of the parties concerned therein, and that the affairs of both companies be wound up, their assets marshaled and distributed, and to whomsoever may be adjudged to be entitled thereto.

TENTH. That said receiver be restrained from paying any fees or other expenses except upon an order of this Honorable Court until an accounting is had and a hearing touching your petition-
329 ers' rights to the premises.

ELEVENTH. That this Honorable Court order the receiver of said defendant Companies to furnish a good and sufficient bond to insure the faithful performance.

TWELFTH. And that your petitioners have such other and further and different relief as to the court may seem meet and proper in the premises.

THIRTEENTH. And together with the costs and disbursements in this action expended.

330

BENTON DICK,
Solicitor and Attorney for Petitioners.

STATE OF ARIZONA, }
COUNTY OF MARICOPA. } ss.

Inocente Morales, being first duly sworn, deposes and says: That he is one of the petitioners above named, that he has read the foregoing peti-

tion and knows the contents thereof and that the 331
 same is true of his own knowledge, except as to
 matters therein stated on information and belief,
 and as to those matters he believes it to be true.

That this verification is made by petitioner in
 his own behalf and on behalf of his co-petitioners.

INOCENTE MORALES.

Subscribed and sworn to before me this.....
 day of April, 1913.

 Notary Public.

My commission expires..... 332

motion will be presented to this Honorable Court 337
as soon as counsel can be heard.

ROBERT E. MORRISON,
JOSEPH E. MORRISON, and
BENTON DICK,
Solicitors and Attorneys for Petitioners.

IN THE

District Court of the United States

FOR THE DISTRICT OF ARIZONA.

338

CHARLES W. CLARK,	}	
Complainant,		
vs.		
ARIZONA MUTUAL SAVINGS		
AND LOAN ASSOCIATION,		
and the Arizona Trust Com-		
pany,		
Defendants.		

In Equity.

No.

The petition of J. L. Waring, C. T. Wise,
Frank Pister, Mrs. C. F. Richardson, Lulu Y.
Carruthers, Daniel Hibbard, G. E. Phelps, Le-
suer & Co., J. H. Barnett, R. N. Stapley, C. H.
Schulz, R. W. Wagoner, Frank W. Smakel, 339
Thomas A. RiCel, Fred Hensing, Margaret Bab-
bett, David B. Lovell, J. W. Francis, G. I. Smith,
August P. New, Edgar A. Brown, Martin F.
Taylor, August Johnson, John P. Steinmetz, Aug-
ust Schwalbe, Irving De Vry, Inocente Morales,
Oscar Emerson, Stella Wade, John F. Klock, F.
W. Smith, Chas. Cahn, Maude Webster, Elmer
G. Carroll, Francis N. Courard, B. Hock, John
Wagner, Mariana Pascale, J. Knox Corbett,
Sarah Oliver, Y. N. Gallegos, D. W. Ellsworth,
Ernestine B. Robles, Rena Ridley, J. T. Griffiths,

- 340 Joshua Willis, Verba Willias, Pearl Bailey, Emma B. Jennings, D. Keith, J. S. Merrett, W. H. Merritt, Frank L. Hurgett, M. A. Roberts, Choor Folk, Nellie I. Roberts, Lizzie Polk, Charlotte Monroe, P. W. Black, Mrs. L. B. Allison, Henry O. Jaasted, Mrs. I. Bartholomew, Martha A. Kreiling, Thomas W. Massie, Hiram Bhinkerhoff, F. T. Willis, D. C. Palmer, T. R. Blomberg, D. F. Coggans, Franklin E. Potts, Demetrio Romero, Andrew P. Martin, J. G. Sturgeon, Leonor Frederico, J. M. Gibbs, B. Caretto, James J. Devine, Roger W. Bishoff, Albert Sandoval, Nelson Gorman, Minnie C. Blesi, Elene V. Lincoln, Amalia Scheurle, Sarah E. Marsh, Elizabeth
- 341 C. Devine, Annie H. Curley, Charles L. Day, R. C. Smith, E. A. Jacobs, Virginia A. Rosenfeld, Harry B. Wilcox, C. N. Cotton, Joseph Morello, L. F. Kuhn, William Harn, Archie Chisholm, J. W. McLaughlin, intervening petitioners herein, through their attorney and solicitors, Joseph E. Morrison and Benton Dick, and respectfully allege and show to this Honorable Court:

I.

- That heretofore, and on the 15th day of July, 1912, there was filed in this Honorable Court a bill of complaint in equity, wherein one Charles
- 342 W. Clark was complainant and the Arizona Mutual Savings and Loan Association and the Arizona Trust Company were defendants; that said suit was brought by the complainant above named, on behalf of himself and all others similarly situated as stockholders in the defendant, the Arizona Mutual Savings and Loan Association, for the relief prayed for in said bill of complaint and that the final decree in said cause was entered on the 27th day of February, 1913, as hereinafter set forth.

That all of your petitioners, except John Wagner, have been stockholders in the Arizona Trust Company since about the 1st day of May, 1912, and that your petitioner, John Wagner, has been a stockholder in the Arizona Mutual Savings and Loan Association since about the 1st day of April, 1911.

III.

That your petitioners desire to intervene in the above-entitled cause in support of the allegations contained in complainant's bill heretofore filed 344 herein and in support of the allegations in this petition to the end that the rights of your petitioners, and each of them, as well as those who have not joined in this petition, in connection with all of the matters set forth in said complainant's bill and said petition may be submitted to the jurisdiction of this Court, by it to be dealt with in accordance with law and equity and the rules and practice of this Honorable Court. And in this connection your petitioners in support of this, their petition for leave to intervene herein, refer to and beg leave to make a part hereof, each and every paragraph of complainant's bill of complaint herein, insofar as the same may be applicable to the case of your petitioners. 345

IV.

That in addition to the matters set forth by reference to complainant's bill as aforesaid, *your petitioners herein, who are stockholders in the defendant Arizona Trust Company, as aforesaid, allege that heretofore each of said stockholders was a stockholder in the defendant Arizona Mutual Savings and Loan Association and as such*

346 entitled to all the rights and privileges of such stockholder in and to their proportionate shares of the assets and properties of said Arizona Mutual Savings and Loan Association. That at various times subsequent to April, 1911, your petitioners were induced to surrender their stock in the Arizona Mutual Savings and Loan Association, by the false and fraudulent representations made to them by the Arizona Trust Company and the Arizona Mutual Savings and Loan Association.

V.

That on or about the 11th day of September, 347 1912, a receiver was appointed for the Mutual Savings and Loan Association, and on or about the 9th day of November, 1912, a receiver was appointed for the Arizona Trust Company; *that your petitioners had no notice of the appointment of said receivers nor any knowledge whatsoever of said appointments; that your petitioners were unaware that said companies were in the hands of a receiver and insolvent until some time in the month of February, 1913; that after the appointment of a receiver for the Arizona Trust Company, as aforesaid, the affairs of said company were so conducted that your petitioners were kept in ignorance of the true conditions with the re-*
 348 *sult that several of your petitioners made payments on their stock to the Arizona Trust Company at the office of said company in the city of Phoenix, which said payments were accepted by persons in charge of the office of said company and who represented and pretended to represent said company, when in truth and in fact said persons represented the receiver thereof and that said payments, so made as aforesaid, were accepted by said persons without notice to your petitioners that said concern was in the hands of a receiver.*

That on the 27th day of February, 1913, a final decree was entered in the above entitled cause in which it was adjudged that certain intervening stockholders in the Arizona Mutual Savings and Loan Association and the Arizona Trust Company should receive the sums set opposite their respective names in said decree, which said decree is by reference made a part hereof; that none of your petitioners were mentioned in said decree; *that no notice was given petitioners of any pending suit; that petitioners were unaware that said companies were insolvent or that any suit was pending or that their rights were not protected* 350 *until after the 27th day of February, 1913, that the rights of petitioners have not been determined and unless said decree is set aside the rights of your petitioners will not be protected for the reasons hereinafter set forth.*

VII.

That said decree, so entered on the 27th day of February, 1913, as aforesaid, is inaccurate and does not conform to the facts and the records of said companies in that the names of several stockholders are duplicated therein and that in some instances larger amounts are decreed and 351 ordered paid than the amounts paid in by said stockholders.

VIII.

Petitioners further aver that on the 19th day of March, 1913, Sims Ely, receiver of the Arizona Mutual and Arizona Trust Companies, entered into an agreement with one J. W. Walker, whereby said receiver agreed to dispose of certain real estate to the said J. W. Walker and that one W.

352 T. Smith guaranteed, or attempted to guarantee, the performance by said J. W. Walker of all his undertakings in that behalf; that petitioners are informed and believe, and therefore state the fact to be, that the price agreed upon between said receiver and said Walker, for said property, is wholly inadequate; that said W. T. Smith, who guaranteed, or attempted to guarantee, the performance of said contract by said Walker, as aforesaid, is the identical W. T. Smith who was president of said Arizona Trust Company for some months prior to the time the receivership proceedings were instituted and who was largely responsible for the failure and insolvency of said

353 company; and that the said Walker and the said Smith have for a number of years been closely associated in different business transactions and that your petitioners verily believe that the object of making said agreement for the sale of said property was to enable said Smith to cover up former transactions which were detrimental to the best interests of the stockholders; that since said Smith has ceased to be an officer of the said company, and during different stages of the receivership of the Arizona Mutual and Arizona Trust Companies, said Smith and said Walker have dominated and controlled the affairs of said companies and that they are now attempting to

354 dominate and control the affairs of said companies and to dictate the policy of the receiver; that the price agreed by said Walker to be paid for said land is, as petitioners are informed and believe and therefore state the fact to be, less than one-half of its actual cash value and that your petitioners verily believe that there is collusion between said Smith and said Walker to purchase said property for much less than its actual value.

IX.

That the sums which the receiver is authorized

to pay to the various intervening stockholders in the Arizona Mutual and Arizona Trust Companies, under and by virtue of the decree, as aforesaid, nearly equal the present available assets of said companies and if the sale by said receiver to said Walker is consummated, all of the available assets will have been consumed and nothing will be left for petitioners unless the contract between said receiver and said Walker is rescinded and said decree set aside; that if said decree is not set aside your petitioners will sustain a total loss of all money invested in said companies and will not receive their proportionate share of the assets of said companies, nor any thereof.

355

X.

That the said Arizona Mutual Savings and Loan Association and the Arizona Trust Company are wholly insolvent and unable to meet and discharge the various obligations assumed by said companies and that your petitioners have no adequate remedy at law to redress the wrongs and grievances herein set forth, except in a court of equity, and in the above-entitled cause.

WHEREFORE, your petitioners, and each of them, respectfully pray this Honorable Court:

FIRST. That they and each of them may be permitted to intervene in the above-entitled cause and join in the prayer of the complaint therein.

SECOND. That the final decree entered in the above-entitled action on the 27th day of February, 1913, be set aside and held for naught, and that said case be re-opened and that your petitioners be allowed to intervene to the end that their rights may be protected.

THIRD. That the order of Court, if any there

358 was, confirming the agreement of sale between the receiver and J. W. Walker be vacated and that the receiver be ordered to rescind said agreement.

FOURTH. Your petitioners, who are stockholders in the defendant Arizona Trust Compnay, pray that the transaction whereby said petitioners assigned and transferred their stock in the defendant Arizona Mutual Savings and Loan Association for stock in the defendant Arizona Trust Compnay may be rescinded and declared to be of no force and effect.

359 FIFTH. That a restitution or re-assignment to the said petitioners of the stock in the Arizona Mutual Savings and Loan Association so transferred by them to the defendant Trust Compnay, be adjudged and decreed and that the cancellation of the certificates of stock received by said petitioners from said Trust Company, as aforesaid, may be ordered.

SIXTH. That it be adjudged and determined that the transaction whereby your petitioners gave up their stock in the defendant Loan Association for stock in the defendant Trust Company, is wholly void and of no effect.

360

SEVENTH. That the defendant Trust Company be required to make complete restitution of all of the properties heretofore received by it from the defendant Arizona Mutual Savings and Loan Association, together with the interest and income thereon.

EIGHTH. That said restitution be made to the receiver for the purpose of preserving and taking into his possession all of the assets of both of said defendants and to the end that full and complete

justice and equity may be done between all of the parties hereto. 361

NINTH. That an accounting between both of said defendant companies be had, as well as an accounting between the said defendants and their respective stockholders, and that a master be appointed to take proofs of the facts herein alleged and to determine the rights and equities of all the parties concerned therein and that the affairs of both companies be wound up, their assets marshaled and distributed to whomsoever may be adjudged to be entitled thereto.

TENTH. That said receiver be restrained from paying any fees or other expenses except upon an order of this Honorable Court until an accounting is had and a hearing touching your petitioners' rights in the premises. 362

ELEVENTH. That your petitioners have such other and further relief as to the Court may seem meet and proper, together with the costs and disbursements in this action expended.

ROBERT E. MORRISON,
JOSEPH E. MORRISON,
BENTON DICK,

Solicitors and Attorneys for Petitioners.

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UNITED STATES OF AMERICA, } ss.
STATE OF ARIZONA.

Benton Dick, being first duly sworn, deposes and says: That he is one of the solicitors and attorneys for the petitioners above named; that he has read the foregoing petition and knows the contents thereof, and that the same is true of his own knowledge except as to matters therein

364 stated on information and belief and as to those matters he believes it to be true; that this verification is made for and on behalf of said petitioners.

BENTON DICK.

Subscribed and sworn to before me this 15th day of July, 1913.

(Seal) ALLAN B. JAYNES,
Clerk United States District Court.

By.....Deputy.

365

366

EXHIBIT II.

367

IN THE

District Court of the United States

FOR THE DISTRICT OF ARIZONA.

CHARLES W. CLARK,	}
Complainant,	
vs.	
ARIZONA MUTUAL SAVINGS	
AND LOAN ASSOCIATION,	
and the Arizona Trust Com-	}
pany,	
Defendants.	

In Equity.

No. 53.

368

DECREE.

The bill in this cause was filed by a stockholder of the Arizona Mutual Savings and Loan Association on behalf of himself and all other stockholders who might desire to come in and join in the suit. Its fundamental equity is the wrongful transfer of assets of the Loan Association to the Trust Company and the fundamental relief prayed for is the restitution of the assets of the Loan Association to the corporation, or to the receiver of that corporation, to be distributed to its stockholders on its dissolution by order of the Court.

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The answers of both the Loan Association and Trust Company show the circumstances of the transfer of the assets of the Loan Association were clearly and plainly illegal and fraudulent and without effect to legally transfer these assets and clearly establish the right of the Loan Association to a full restitution.

The various intervening petitions filed prior to the decree in this cause contain in each a prayer

370 "that the transactions therein set forth as made between the said Loan Association and the said Trust Company may be declared to be annulled and of no force and effect, and that a restitution of all the assets of the defendant Loan Association from the defendant Trust Company be adjudged and decreed; that an accounting between both of the defendants above named be had and taken; that the Court appoint a master to take proof of the facts alleged in the bill and to determine the rights and equities of all the parties concerned herein, and that the effects of the Loan Association be wound up, its assets marshaled as aforesaid and distributed to those found to be entitled thereto." In neither the original bill nor

371 in any intervening petition is there any prayer for a confirmation of the title of the Trust Company or that the Court should vest the title of the property in that Company.

In all the pleadings the relief sought is based on the legal and equitable rights of the Loan Association to have a complete restitution of its assets and to have its assets marshaled and distributed to those found to be entitled thereto.

It is too clear to admit of argument that the assets of the insolvent corporation, after the payment of its just debts, are to be distributed equally amongst its stockholders and that the Court has

372 no warrant of law to make any other disposition of them as between the stockholders. There is no order in this case giving notice to the stockholders to present their claims to the assets of the company or to show their interest in its property.

The decree entered herein on the 27th day of February, A. D. 1913, without such notice and opportunity being afforded and without referring the case to a master, as prayed in the bill, to determine the rights and equities of all parties concerned, is that said stockholders mentioned in the

decree shall receive all they have paid in, not their proportionate share of the assets of the Loan Association, and by this means these particular stockholders are relieved of all participation in any losses of the Loan Association and are given a lien upon said assets to the exclusion of other stockholders. 373

It is fundamental that where a judgment or decree has been made which is responsive to the pleadings and in the due course of the lawful jurisdiction of the Court, such decree is beyond the power of the Court to modify or change after the adjournment of the term at which it is rendered, but it does not follow that because this is so that the Court may not set aside or modify a judgment which is not of such a character. In order to render the judgment or decree a finality, the emphatic requirement is that it must be responsive to the matters litigated, and in consonance with the legal relief to which the facts averred show the parties to be entitled. 374

The question is, has the Court jurisdiction to the extent claimed, and to constitute this there are four essentials:

FIRST: The Court must have cognizance of the class of cases to which the one adjudged belongs.

SECOND: The proper parties must be present. 375

THIRD: The point decided must be in *substance and effect* within the issues.

FOURTH: The Court must have proceeded after having acquired jurisdiction of the case, "according to established modes governing the class to which the case belongs."

A court must not go outside of its appointed sphere and it is impossible to concede that because

376 A. and B. are parties to a suit that the Court has the right or power to decide or determine any matter in which they are interested, whether the matter is involved in the pending litigation or not. A judgment on the matter outside the issues is of necessity altogether unjust because it concludes a point upon which the parties have not been heard. In order to make a judgment conclusive not only the proper parties must be present, but the Court must act on the property according to the rights which appear on the record.

It is the opinion of the Court that the decree of February 27th, 1913, which attempts to vest the title of the assets of the Loan Association in 377 the Trust Company is beyond the issues of the case made by the bill and answers and intervening petitions, it being shown by the pleadings that the Loan Association was insolvent when it did so and that it received no legal consideration for such transfer.

I am likewise of the opinion that the Court exceeded its powers on the pleadings and proof before it when it gave a lien to the intervening creditors on the assets of the Loan Association in the hands of the Trust Company for the amount they had paid in and compelled the parties who were interested in the assets of the Loan Association to bear all the losses incurred by the Loan Association in the conduct of its business. 378

IT IS THEREFORE ORDERED that the decree of the 27th day of February, A. D. 1913, be and the same is hereby modified as follows:

IT IS ORDERED that all the properties and assets of every kind and description which were transferred to the Trust Company by the Loan Association, be restored to the said Loan Association, or the receiver for said Loan Association, and that all contracts, conveyances or agreements

which were entered into by the said Loan Association or its agents or officers, be and the same are hereby set aside, vacated and annulled. 379

IT IS FURTHER ORDERED that the Trust Company transfer and deliver to the receiver in this cause, all property of every kind received by it, its officers or agents, from or on account of the transfer of the said assets of the said Loan Association or received by it from the use and investment or other disposition of any moneys or other property of the said Loan Association.

IT IS FURTHER ORDERED that this cause be referred to Edwin F. Jones, Standing Master of this Court, to state the account between the Loan Association and the Trust Company and to that end he shall hear testimony and may examine and inspect all papers on file in this Court or in the hands or possession of the receiver in this cause. 380

IT IS FURTHER ORDERED that the said Standing Master ascertain and report the exact amount due by said Loan Association to each of its stockholders, and in order to do so he is directed to publish a notice in some newspaper in the City of Phoenix, for at least five times, requiring all persons claiming to be stockholders in said Loan Association to file their claim, with proof thereof, with him within thirty (30) days from the first publication of such notice, and that he send by mail to each of the stockholders of said Loan Association a copy of such notice. 381

IT IS FURTHER ORDERED that the said Standing Master report on the priorities or equities of all persons claiming to be interested in the property of the said Loan Association and the order in which same are to be paid out of the assets of the said Loan Association.

382 IT IS FURTHER ORDERED that the Master report what are the rights of said Loan Association in any assets now in the hands of persons not parties to this suit and whether or not same can be recovered from the parties to whom they were transferred.

IT IS FURTHER ORDERED that the Master ascertain and report what sum of money or other assets of the said Loan Association were unlawfully used by any officer or agent of either the Loan Association or Trust Company, and whether same or any part thereof can be recovered from said parties or their transferees.

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IT IS FURTHER ORDERED that the demurrers to the petitions now on file seeking intervention, be and the same are over-ruled and that the petitioning parties mentioned in the petition of July 15th, 1913, be allowed to intervene in this cause and present their claims to the Master for adjudication in accordance with this decree.

IT IS FURTHER ORDERED that Sims Ely, the receiver in this cause, be appointed general receiver herein, with all proper powers and that he hold all of the assets and property now in his hands belonging to either of said corporations until the
384 further order of this Court.

All other questions are reserved until the coming in of the report of the Master.

DONE IN OPEN COURT this 12th day of March,
A. D. 1914.

WM. H. SAWTELLE,
Judge.

IN THE
**United States
Circuit Court**
of Appeals

FOR THE NINTH CIRCUIT.

IN THE MATTER

OF

The Application of JOHN DEN--
NETT, JR., ET AL., for a Writ
of Mandamus, directed to the
HONORABLE WILLIAM H. SAW-
TELLE, District Judge of the
UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF
ARIZONA, and directed to said
District Court.

BRIEF
OF THE
PETITIONERS

BRIEF

On Motion for Leave to file Petition for Writ of
Mandamus and for an Order to Show Cause.

WILLIAM M. SEABURY,
Attorney for Petitioners,
Fleming Building,
Phoenix, Arizona.

IN THE
United States
Circuit Court
of Appeals

FOR THE NINTH CIRCUIT.

IN THE MATTER
OF

The Application of JOHN DENNETT, JR., ET AL., for a Writ of Mandamus, directed to the HONORABLE WILLIAM H. SAWTELLE, District Judge of the UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA, and directed to said District Court.

BRIEF
OF THE
PETITIONERS

BRIEF IN SUPPORT OF MOTION FOR
LEAVE TO FILE APPLICATION
FOR WRIT OF MANDAMUS.

This is a Motion for Leave to file an Application for a Writ of Mandamus, directed to the

United States District Court for the District of Arizona, and to the Honorable William H. Sawtelle, as Judge thereof, to compel said Court and Judge to expunge from the Records of said Court the Order or Decree made and entered in said Court in the Cause of Charles W. Clark, Complainant, against the Arizona Mutual Savings and Loan Association, and the Arizona Trust Company, on March 12, 1914, and to prohibit said Court and Judge from proceeding further in said Cause contrary to and in violation of the terms of the final Decree in said Cause of February 27, 1913.

On February 27, 1913, a final decree, Exhibit 8 annexed to the petition herein, was entered and enrolled in the United States District Court for the District of Arizona, in a minority stockholders' suit entitled as stated above (fols. 18, 265).

The October, 1912, term, at which the decree was entered and enrolled, expired April 5, 1913 (fol. 27).

On July 15, 1913, after the expiration of said term and while the decree of February 27, 1913, stood unappealed from and unreversed, the persons named in Exhibit 10, annexed to the petition herein, moved to intervene in said cause and to vacate said decree (fols. 29-30).

The Court and the Honorable Judge thereof granted the motion, vacated the decree of February 27, 1913, and entered an entirely different decree in its place, notwithstanding the protest of the petitioners herein. This new decree was dated and entered March 12, 1914, and substan-

tially affects, modifies and varies the rights of the petitioners acquired by said prior decree (fols. 34-37, 377-384).

It is to annul and expunge from the records of the District Court this decree of March 12, 1914, as a nullity, and to reinstate the decree of February 27, 1913, and to prohibit further proceedings inconsistent therewith that these proceedings are brought (fols. 54-55).

Since it appears from the record and from the authorities hereafter cited that the decree of February 27, 1913, is not void and that the decree of March 12, 1914, is a nullity, it follows that the petitioners are entitled to relief by mandamus, since no other adequate remedy exists.

POINT I.

THE DECREE OF FEBRUARY 27, 1913, IS NOT VOID.

It is not disputed that a diversity of citizenship between the complainant and the defendants exists and that a controversy in which the requisite amount was involved was presented by the pleadings and the proof, and that this was the sole basis of Federal jurisdiction (fols. 9-10, 67-70).

It also appears that the court acquired jurisdiction of the person of the defendants by the service of process and by the appearance of each defendant (fols. 13, 16). The cause alleged in the bill

was obviously one of equitable cognizance in which the court had jurisdiction of the subject matter (fols. 11-13).

The suit, as already indicated, was a minority stockholders' suit, wherein the chief relief sought was a restoration of the property of the Loan Association to the end that by and through the medium of its receiver, its assets might be distributed to its stockholders (fols. 11-13, 109-113). The bill, however, recognized the inherent difficulties which would inevitably be encountered in the literal enforcement of such relief and expressly alleged that since the transfer of the Loan Association assets to the Trust Company a confusion and intermingling of the assets of the two companies had taken place to such an extent that it was difficult to separate them, and in addition to the prayer for the specific relief, above referred to, the complainant prayed for general relief in the premises (fols. 99-101, 111-112).

The petitioners, mentioned in Exhibits 2, 3, 4, and 5, who intervened before the trial, prayed for substantially the same relief as the original complainant, save that having been induced by fraud to exchange their stock in the Loan Association for stock of the Trust Company, they also prayed that their stock in the Loan Association be restored to them (fols. 156-161, 180-185, 199-204, 219-224). They all likewise prayed for general relief (fols. 161, 185, 204, 224).

When the cause came on for trial the utter impossibility of enforcing a restoration of the property in kind became and was manifest. Much of

the Loan Association's property had been reduced to cash and the proceeds dissipated by the officers of the Trust Company (fols. 21-22, 278-279).

But these facts naturally did not warrant a dismissal of the litigation before the court, merely because the interveners could not secure the particular relief they had prayed for, or because, not having been able to foresee the exact situation as it would exist at the time of trial, the litigants had failed to pray for the specific relief which on the facts could be lawfully accorded to them.

Consequently, the learned court, as constituted at the time of trial, adjusted the equities presented as best it could. The court realized that even at the time of trial only a minority of the former stockholders of the Loan Association were opposed to the absorption of the Loan Association by the Trust Company and, that however fraudulent the representations made to the interveners then before the court might have been, the court could not assume that the other former stockholders of the Loan Association who now appear by Exhibit 10, annexed to the petition herein, were similarly deceived, or even if they were so deceived, that they were dissatisfied with the transactions whereby they surrendered their status as Loan Association stockholders and became preferred stockholders in the Trust Company, and the latter company absorbed the assets of the former. Any such assumption would have been particularly unwarranted, since the absorption took place nearly two years before the trial and the proceedings then before the court had been begun some seven months before (fols. 11, 17).

Moreover, a comparison of the petitioners in Exhibit 2 and those named in Exhibits 9 and 10, shows that nineteen of the ninety-seven stockholders of the Trust Company, formerly stockholders of the Loan Association, who, long after the entry of the final decree, are seeking admission to the litigation by means of Exhibit 10, were at the commencement of the litigation parties to the record, but had voluntarily withdrawn from the proceedings as early as August, 1912, and since that time had made no effort to return to it until April and July, 1913 (fols. 119, 305, 338-341).

All parties interested in the proceedings were, however, represented therein. The complainant and the interveners represented all the stockholders of the Loan Association, having representative character to bind all those of the same class. (Equity Rule 38, *Richmond vs. Irons*, 121 U. S. 27; *Lamar vs. Hall*, 129 Fed. 79, 83). The stockholders of the Trust Company, including those attempting to intervene now by Exhibit 10, were represented by the Trust Company.

The decree of February 27, 1913, expressly refrained from any adjudication as to the validity of the transaction between the two companies except as to the interveners then before the court, and the stockholders of the Loan Association (fols. 278-282). The rights of these persons were ascertainable with substantial accuracy and were enforced in a manner which would not work unnecessary hardship to the Trust Company or needlessly prejudice or injure its innocent creditors or its stockholders.

The learned court took the view, which is amply

supported by the authorities, that the insolvency of the Loan Association terminated the contract between it and its members. (*Sullivan vs. Stucky*, 86 Fed., 491, 492. *Lewis vs. Clark*, 129 Fed., 570, 574. *Towle vs. American, etc., Society*, 61 Fed., 446, 447. *Mutual Loan Association vs. Tyre*, 81 Atl., 49, 51). Nothing, therefore, remained "but to wind up the Association in such a manner as to do equity to its creditors, its debtors and its stockholders." (*Mutual Loan Association vs. Tyre*, *supra* at page 51).

To this end the court decreed that all the stockholders of the Loan Association, including those who by the decree were restored to their rights as such, receive pro rata the amount they had paid in to the failing enterprise. As the stockholders of the Association were its only creditors it was not necessary to protect this class any further (fol. 13). The surrender by the stockholders of the benefits of their contracts with the Association, which promised them at the maturity thereof approximately \$1,000 for every \$600 paid in, and the loss of interest on their payments was regarded by the court as a sufficient contribution to the losses of the enterprise which an equitable adjustment of their rights with those of the Trust Company required them to make (fols. 267-269, 270-275, 284-288). The court regarded the Trust Company as a constructive trustee for the benefit of the stockholders of the Loan Association (fol. 283). As between the stockholders of the Loan Association as beneficiaries of this trust and the creditors and stockholders of the trustee, the equities of the former were so far superior that the court might have decreed that all of the Loan Association's assets and such other property

as the trustee had inseparably mingled with them be applied to the satisfaction of the claims of the beneficiaries. (National Bank vs. Connecticut Mutual Life Insurance Company, 104 U. S. 54, 66, 67. Smith vs. Mottley, 150 Fed., 266, 268. Southern Pine Company vs. Savannah Trust Company, 141 Fed., 802, 808. Erie Railroad Co. vs. Dial, 140 Fed., 689, 691. Smith vs. Township, 150 Fed., 257, 261.)

But the court was not bound to afford this drastic remedy. Observing the equitable principle applicable to the situation before it, namely, that a court will not grant a benefit in such a manner as to cause a great injury where the rights of the complaining party can be amply protected without prejudice to the rights of others affected, the court declined to adopt such a course.

Instead the Trust Company was permitted to continue its business in an effort to allow it to survive, if it could, and work out the surplus remaining after the payment of the liens created by the decree of February 27, 1913, for the benefit of its creditors and stockholders (fols, 281-282, 294-300).

As was said by Judge Severens in *Erie R. Co. vs. Dial*, 140 Fed., 689, at page 691:

“In a common-law court this might, as between the owners and the trespasser, have given title to the owners of the whole mass of tires, if they were indistinguishable. But a court of equity, for the purpose of saving to creditors that value which attached to the things before

owned by the trespasser, will forbear to enforce a confiscation, and, instead, will accord a lien to the owner upon the mass for the value of the things converted. We had occasion to consider this subject in *Holder vs. Western German Bank*, 136 Fed., 90, where we held * * * that, where the tort-feasor had mingled the property of the owner with his own, a lien would attach to the mass *pro tanto*."

Smith vs. Township, 150 Fed. 257, 261.

The receivership decreed was not a general receivership as to the Trust Company. Its purpose was to collect out of all of the assets of both companies a sum sufficient to pay the liens created by the terms of the final decree and thereafter to cause the surplus to be paid to the Trust Company for the benefit of those who are lawfully entitled thereto (fols. 296-298).

It was long after this decree was made and not until July 12, 1913, that the Farmers & Merchants Bank of Phoenix recovered a judgment of \$18,500 against the Trust Company (fols. 38). By that time the hopelessness of the situation of the stockholders of the Trust Company as such, was apparent. Within three days after the recovery of that judgment Exhibit 10, annexed to the petition herein, was filed in the court below for the purpose of nullifying the decree of February 27, 1913, and to allow the ninety-seven preferred stockholders of the Trust Company mentioned therein to share in the benefits obtained by the stockholders of the Loan Association (fols. 338-341, 356-364). Subsequently that decree was, as stated above, modified in very

substantial respects so as in effect to vacate it and to make it an entirely different decree on the alleged ground that the court had no jurisdiction to grant it (fols. 376-384).

The method of adjustment of the rights of the parties adopted by the learned court upon the trial of the cause in February, 1913, violated no fundamental right or equity and resulted in equality. This method did not ruthlessly or unnecessarily destroy the rights of innocent parties not before the court, but whose rights were inevitably affected nevertheless, that is to say, the creditors of the Trust Company; but did supply an efficient, expeditious and economical means of administering the estate of the insolvent.

All of the former stockholders of the Loan Association who had elected to remain stockholders of the Trust Company, were represented before the court by the Trust Company (fols. 26). All of the stockholders of the Loan Association either intervened and were represented by their attorney, or their rights were fully protected on an equality with the other stockholders by the decree, and all have accepted its benefits (fols. 19-20, 22-26, 43-44).

The decree has been executed by the declaration and payment of a dividend and in other substantial respects (fols. 37-38).

During the time in which it could lawfully have been the subject of review in the Circuit Court of Appeals for this Circuit, no steps were taken to that end. The time so to review the decree expired and the decree stood unreversed. The term

at which the decree was rendered lapsed and came to an end, the parties on both sides received and accepted its benefits, and all the while the petitioners named in Exhibit 10 remained inactive (fols. 26, 27, 30, 37-38, 41).

This is the decree which has been nullified and swept aside by the learned court below as at present constituted.

The learned court below concedes that a decree which is responsive to the pleadings and rendered in due course of the court's jurisdiction is beyond the power of the same court to modify or change after the term at which it is rendered, "but," says the learned court, "it does not follow that because this is so the court may not set aside or modify a judgment which is not of such a character (fols. 373-374)."

It appears from an inspection of the so-called decree of March 12, 1914, that the sole ground upon which the learned court below based its annulment of the decree of February 27, 1913, is the assertion that the decree was void for want of jurisdiction (fol. 373-374). By this objection the learned court did not question the existence of the diversity of citizenship or of the amount in controversy requisite to confer jurisdiction upon a Federal court, nor was its decision based upon any want of jurisdiction over the person or even of the subject matter involved, but upon the misapprehension that errors of law had been committed in the decree itself, which rendered the decree void for want of jurisdiction, and which it became the court's duty to review, revise and correct (fols. 373-384).

Thus the first ground of invalidity is said to be that the decree is not responsive to the pleadings in that the court vested title in the Trust Company and gave the Loan Association stockholders a lien thereon without any specific prayer in the bill or intervening petitions for such relief and the startling non sequitur is asserted that the decree is consequently void for want of jurisdiction (fol. 371).

The nature of the objection to the decree in this respect appears to be that because the court had jurisdiction and power to grant full relief by complete restoration of the Loan Association properties, a decree which did less by confirming title already vested in the Trust Company and awarding the complainant and interveners a sum of money and giving them a lien upon the property to secure its payment, is void for want of jurisdiction. But this objection loses sight of the fact that the complainant, interveners and remaining stockholders of the Association were a minority of the stockholders of the Association as it existed prior to the transfer of its assets, and were therefore not the only parties to be considered in determining what should equitably be retransferred to the Association (fol. 24).

The decree was, however, responsive to the pleadings and to the proof, with or without the prayer for general relief contained in the bill, and the relief granted was entirely consistent with the relief prayed for.

As we have seen above, granting a lien on the mass where the complainant might have the whole is within the power of a court of equity. (*Erie R. Co. vs. Dial*, 140 Fed., 689, 691. *Smith vs. Township*, 150 Fed., 257, 261).

In *Jones vs. Mo. Edison Electric Co.*, 144 Fed., 765, at page 778, Circuit Judge Sanborn said:

“Nor is the suggestion that the complainant may not recover the value of his stock in this suit in equity because such a recovery would be inconsistent with his repudiation of the contract of consolidation and because he has not prayed for it, very material. The first prayer of the bill is for the restoration of its property to the Edison Company and this is in effect a restoration to the complainant of his share of it. Now, as the court may, under this prayer, rehabilitate the Edison Company, it may do less. It may grant a decree nisi, a decree that all its properties, powers and franchises be restored to the Edison Company unless within a certain time the defendant pay to the plaintiff and those who join him the value of their share of the property transferred to the Consolidated Company. Such a decree would be consistent with the repudiation of the contract of consolidation and with the first prayer in the bill.”

Many authorities recognize the right of Courts of Equity, especially in stockholders' suits, to render any decree which does substantial justice between the parties before it, so long as the decree relates to the subject matter involved, irrespective of the specific relief prayed for in the bill.

In *Beling vs. American Tobacco Company*, 72 New Jersey Eq., 32, 44, a suit brought by a minority stockholder to set aside the merger of the American Tobacco Company with certain other companies, resulted in the decree of the Chancel-

lor that the complainant should have the cash market value of his stock at the time of consolidation with all dividends which could possibly be declared on it up to the time of the expiration of the charter of the company in which he was a stockholder; or in the alternative, if the complainant did not see fit to accept such relief, that his bill be dismissed without prejudice to his action at law. The complaint in this cause contained no prayer for such relief.

See also *Backus vs. Brooks*, 195 Fed., 452, 454.

In the case at bar, as has already been stated, there was not only an allegation that the property of the Loan Association had been mingled with the property of the Trust Company in such manner as to be separable with difficulty, but there was also a prayer for general relief (fols. 100-101, 111). It was also clear from the allegations of the bill and intervening petitions, that the equities of the complainant, interveners and other stockholders of the Association, though paramount, were not the only ones involved (fols. 87-88, 151-154). Clearly, therefore, the relief granted was within both the specific and the general prayer for relief.

In *Walden vs. Bodley*, 14 Pet., 156, Justice McLean said at page 164:

“The courts have, by the bill, answer and evidence, the equities of the parties before them; and, having jurisdiction of the main points, they may settle the whole matter. A court of equity cannot act upon a case which

is not fairly made by the bill and answer. But it is not necessary that these should point out, in detail, the means which the court shall adopt in giving relief. Under the general prayer for relief, the court will extend relief beyond the specific prayer and not exactly in accordance with it. Where a case for relief is made in the bill, it may be given, by imposing conditions on the complainant, consistent with the rules of equity, in the discretion of the court."

In *Underground Elec. Ry. Co. vs. Owsley*, 169 Fed., 671, the bill was by a creditor for the appointment of a receiver of a decedent's estate and its administration. It was held that the Federal Court could not administer the estate as it was pending in a state probate court, but it would appoint a receiver to preserve the estate pending the probate proceedings. Judge Ward said at p. 675:

"It must be admitted that the bill does pray for the administration of the estate. As, however, it contains a prayer for general relief, the court is competent to give any relief consistent with the case made out in the bill, even if it is more or less or different from the relief prayed for."

In *Lockhart vs. Leeds*, 195 U. S., 427, the plaintiff's bill prayed that the location of a mining claim by the defendants be declared void, and that the plaintiff may have possession of the claim, and then prayed for relief generally. It was held that under the general prayer the court could decree that the title in the defendant was valid, yet by reason of the fraud set forth in the bill, was

subject to a constructive trust in favor of the plaintiff. Mr. Justice Peckham said at page 436:

“There is nothing in the intricacy of equity pleading that prevents the plaintiff from obtaining the relief under the general prayer, to which he may be entitled upon the facts plainly stated in the bill. There is no reason for denying his right to relief, if the plaintiff is otherwise entitled to it, simply because it is asked under the prayer for general relief and upon a somewhat different theory from that which is advanced under one of the special prayers.”

See also *Haggart vs. Wilczinski*, 143 Fed., 22, 28; *London & S. F. Bank vs. Dexter*, 126 Fed., 593; *Watts vs. Waddle*, 6 Pet., 389, 402; *Tyler vs. Savage*, 143 U. S., 79, 97; *Sage vs. Central Ry. Co.*, 99 U. S., 334, 342; *Waterman vs. Canal Louisiana Bank*, 215 U. S., 33, 45; *Stevens vs. Gladding*, 17 How., 447, 455; *Taylor vs. Merchant's Fire Ins. Co.*, 9 How. 390, 405; *David vs. McRae*, 183 Fed., 812, 814, *af'd*. 184 Fed., 988; *Hayward vs. McDonald*, 192 Fed., 890; *Patrick vs. Isenhardt*, 20 Fed., 339; *Dick Co. vs. Fuller*, 198 Fed., 404, 406; *Wilson vs. Plutus U. Co.*, 179 Fed., 317; *Rexford vs. Southern W. Co.*, 208 Fed., 295, 316.

Again it is asserted that the decree was subject to vacation by the learned court below because in the rendition of the decree of February 27, 1913, the court had proceeded without the assistance of a Master. But the court saw no necessity to plunge the estate into the expense incident to proceedings before a Master, to delay its administration, settlement and distribution to no

useful purpose when the court was amply able to make the decree which did substantial justice to the parties. Moreover, the avoidance of the proceedings before the Master was in accord with the spirit of the equity rules last promulgated by the Supreme Court, which contemplate the trial of equity cases wherever possible before the court and the abandonment of the cumbersome and expensive proceedings before masters required by the earlier procedure (Equity Rule 46).

The decree of February 27, 1913, was attacked in another respect. Even its justness and its equity were made the subject of review and revision by the learned court below and although no proof was taken upon the subject, the learned court assumed that the stockholders of the Loan Association had been relieved of participating in any of the losses the Loan Association had sustained and that such stockholders were given a lien to the exclusion of other stockholders, by which the court meant the stockholders of the Trust Company named in Exhibit 10 (fol. 373). As we have already pointed out, this is an obvious misapprehension.

But not one of these objections to the decree of February 27, 1913, presented any question of jurisdiction. It cannot intelligently be disputed that when the court made the decree of February 27, 1913, there was pending before it for determination a justiciable controversy which it had the power to decide and its decision of the cause, however, erroneous, was nevertheless just as valid and binding as though the decree had received the sanction of this learned court.

In *Hine vs. Morse*, 218 U. S., 493, Mr. Justice Lurton said on page 505:

“The Supreme Court of the district has jurisdiction over the subject matter, the res. It had jurisdiction over the parties. It was, according to due course of equity proceeding, called upon to examine the will and the statute which gave the power to make the sale in certain circumstances. If then jurisdiction consists in the power to hear and determine, as has so many times been said, and the court errs in holding that a case has been made either under its inherent power or its statutory authority, can it be said that it has usurped jurisdiction and that its decrees are absolute nullities? To this we cannot consent. If the court was one of general and not special jurisdiction, if under its inherent power, supplemented by statutory enlargement it had jurisdiction under any circumstances to sell the real estate of minors for reinvestment, it had jurisdiction to examine and determine whether the particular application was within or beyond its authority. To do this was jurisdiction. If it errs, its judgment is reversible by proper Appellate procedure. But this judgment, until it be corrected, is a judgment, and cannot be regarded as a nullity.” Again at page 509, the court said:

“The line between a judgment which is a plain usurpation of jurisdiction and one which is merely erroneous and reviewable only by seasonable appeal is a plain one. The case in hand falls, in our judgment, within those which are merely reversible upon appellate proceedings, and the judgment decreeing the sale and appointing Waggaman as trustee to make the sale, is not a nullity.”

Quoting from *Vorhees vs. Bank*, 10 Pet., 449, 474, the court continued:

"The line which separates error in judgment from usurpation of power is very definite and is precisely that which denotes the cases where a judgment or decree is reversible only by Appellate Court or may be declared a nullity collaterally when it is offered in evidence in an action concerning the matter adjudicated or purporting to have been so. In the one case, it is a record meriting absolute verity; in the other, mere waste paper; there can be no middle character assigned to judicial proceedings which are irreversible for error. Such is their effect between the parties to the suit; and such are the immunities which the law affords to a plaintiff who has obtained an erroneous judgment or execution.

It follows that the decree of February 27, 1913, was not and is not void.

POINT II.

THE DECREE OF MARCH 12, 1914, IS A NULLITY.

After the expiration of the term at which a decree in equity is entered, the court has no jurisdiction to vacate or modify it, except for fraud, want of jurisdiction to render it, or to change it for clerical error. A wealth of judicial authority supports this elementary proposition.

In *Sibbald vs. U. S.*, 12 Pet., 488, Justice Baldwin, at p. 492, said:

"No principle is better settled, or of more

universal application, than that no court can reverse or annul its own final decree or judgment for errors of fact or law, after the term in which they have been rendered, unless for clerical mistakes * * or to reinstate a cause dismissed by mistake * * from which it follows, that no change or modification can be made, which may substantially vary or affect it in any material thing. Bills of review, in cases in equity, and writs of error *coram vobis*, at law, are exceptions which can not affect the present motion."

(In re Metropolitan Trust Co., 218 U. S., 312, 320; Cameron vs. McRoberts, 3 Wheat, 590).

The sole ground upon which the learned court below based his vacation of the decree of February 27, is a supposed lack of jurisdiction in the court to grant that decree. But this contention on the part of the learned judge, as we have shown, proceeds entirely from a misconception and a misapprehension of the difference between a void decree and one which is merely erroneous.

Since, as we have shown, the decree was not even erroneous, much less void, it necessarily follows that the learned court below assumed and exercised a power which neither the learned judge nor the court over which he presides had power or authority to exercise.

It follows, therefore, that this exercise of assumed authority, rendered the decree of March 12, 1914, absolutely void and a nullity.

It is a matter deeply to be regretted that the

learned court below, notwithstanding the citation to it of many authorities, including in re Metropolitan Trust Company, 218 U. S., 312, a case involving the identical principal here presented, and notwithstanding the earnest protest of the petitioners against the course pursued, so entirely misapprehended and misconceived the situation that the final decree of February 27, 1913, was vacated.

Applications for mandamus are not willingly resorted to by counsel who entertain only the highest respect for the learned court which made the decree here complained of, but the misapprehension of the learned court was so serious to the rights of a large number of litigants that no other alternative was presented to the parties adversely affected thereby and an urgent necessity exists for the granting of the relief prayed for herein.

The decree of February 27, 1913, held that the transfer of the assets of the Loan Association was void as to the interveners and other non-consenting stockholders; that the assets of the two companies had been so intermingled that it was impossible to separate them and that the interveners had been induced to exchange their stock in the Association for stock in the Trust Company by fraudulent misrepresentations. These interveners were restored to their status as stockholders of the Association, and the Trust Company was vested with the title to all the property, subject, however, to liens in favor of the interveners and all other stockholders of the Association for the amounts they had paid in on their stock. A permanent receiver was appointed for the Trust Company with duties to sell so much of

its properties as would be required to pay certain allowances and expenses and the liens just mentioned and to pay the surplus to the Trust Company. The same person was also made permanent receiver of the Association with the usual powers. In summary form this is a statement of the important provisions of the decree of February 27, 1913, which was made by the learned court after a trial (fols. 277-301).

The decree of March 12, 1914, by which the former decree was vacated, was made by a different judge *without a trial* and is an entirely different decree, as will be seen by the following summary statement of its provisions.

The former property of the Loan Association was ordered restored to it. This had been declared an impossibility by the former court after a trial. All property derived from the use and investment of Loan Association property was ordered restored to it. The cause was ordered referred to a Master to state the account between the two companies after a hearing, to report as to the exact amount due to each stockholder by the Association, to give 30 days' notice by publication to all stockholders to make their claim, including the petitioners who had already established and proved their claim once upon a trial in open court; to report on the priorities and equities of all persons interested in the property of the Association, to report whether there is any property of the Association in the hands of third parties and whether it can be recovered. The demurrers to the petition of intervention were overruled and the parties named in Exhibit 10 were allowed to intervene and present their claims

to the Master. A general receiver of the two companies was appointed. All other questions were reserved until the coming in of the Master's report (fols. 378-383).

It is very clear, therefore, that the decree of March 12, 1914, materially changed the provisions of the decree of February 27, 1913, and in reality vacated and annulled it.

As the court was without jurisdiction to vacate or substantially modify the decree of February 27, 1913, the decree of March 12, 1914, is void and a mere nullity.

POINT III.

THE PETITIONERS ARE ENTITLED TO RELIEF BY MANDAMUS IN THIS COURT.

On April 13, 1914, the petitioners made application to the Supreme Court of the United States for leave to file a petition for a mandamus or prohibition, or both, directed to the court below and the judge thereof, requiring the decree of March 12, 1914, to be expunged and the reinstatement of the decree of February 27, 1913.

On April 20, 1914, the application was denied without opinion.

Counsel for petitioners did not discover the error in submitting the application to the Supreme Court instead of to this court until after the denial of the application.

Had this case presented a question of jurisdiction peculiar to a National Court the application would properly have been addressed to the Supreme Court. (Judicial Code, sec 234, 262, *Re Metropolitan Trust Company*, 218 U. S. 312; *Matter of Dunn*, 212 U. S. 374; *Virginia vs. Rives*, 100 U. S. 313; *Virginia vs. Paul*, 148 U. S. 107; *Kentucky vs. Power*, 201 U. S. 1.)

But the question of jurisdiction presented here is not one involving the jurisdiction of the district court as a Federal Court but simply its general authority as a judicial tribunal, and could not, therefore, even if the decree of March 12 were final, be certified to the Supreme Court. (*Louisville Trust Co. vs. Knott*, 191 U. S. 225, 233; *Fore River S. Co. vs. Hagg*, 219 U. S. 175; *Darnell vs. Illinois Central R. R. Co.*, 225 U. S. 243; *Bogart vs. Southern Pacific Co.*, 228 U. S. 137, 148.) This consideration is decisive on this question as mandamus to other courts is in the nature of appellate jurisdiction.

Ex parte Crane, 5 Pet. 190, 193.

Where the jurisdictional question involved is one common to all courts and does not include the question of the jurisdiction of the court as a Federal Court, then the application should be addressed to the Circuit Court of Appeals and not to the Supreme Court.

In *Barber Asphalt Co. vs. Morris*, 132 Fed. 945, Judge Sanborn said at page 952:

"The power to issue writs of mandamus was granted to the Supreme Court by Section 688

of the Revised Statutes, but the limit of the power of that court and of this is the same. Each court has jurisdiction to issue the writ to a subordinate court or judge in the exercise of and in aid of its appellate jurisdiction. It is without power to issue it in a case which is not reviewable in that court by appeal or writ of error challenging its final decision, or otherwise, or to issue it to create a case for the exercise of its appellate jurisdiction."

In *Dowagiac Mfg. Co. vs. McSherry Mfg. Co.*, 155 Fed. 524, Judge Cochran said at page 525:

"In view of these decisions it would seem that * * * it is not proper to make the application to the Circuit Court of Appeals * * * to interfere by mandamus with the action of a Circuit Court of the United States where the question involved relates to its jurisdiction as a Circuit Court of the United States.

"If so, the only case in which that court can have power to interfere by mandamus with the action of the Circuit Court, where the question involved relates to its jurisdiction, is where the question is as to its jurisdiction as a judicial tribunal of original jurisdiction. * * * The question here is as to the jurisdiction of the lower court as a tribunal of original jurisdiction. There is nothing, therefore, in the nature of the case itself against this court's power to grant the mandamus sought. * * * The sum of these expressions is that the writ will not be so issued when the action of the Circuit Court is within its jurisdiction. It will

be issued when it is not up to or goes beyond its jurisdiction and there is no other adequate remedy."

(U. S. vs. Swan, 65 Fed. 647, 649; *In re Beckwith*, 203 Fed. 45; *McClellan vs. Carland*, 217 U. S. 268, 279.)

In the case at bar the question directly involved is whether the district court had jurisdiction to modify and vacate its final decree after the end of the term. The only other jurisdictional question raised and involved in this inquiry is whether the former decree was beyond the jurisdictional powers of the court to grant. The reasons given by the District Court for holding this former decree void are that it was not responsive to the pleadings and was inequitable. If these objections raise any question of jurisdiction it is clearly not one of the court's jurisdiction as a Federal Court, but as a court of equity. The only other question involved in this inquiry is whether the decree of March 12, 1914, was final or not. There can be no doubt, therefore, that mandamus lies in this case from the Circuit Court of Appeals and not from the United States Supreme Court.

The jurisdiction of the Circuit Court of Appeals to issue writs of mandamus is derived from Section 262 of the Judicial Code of the United States which provides as follows:

"The Supreme Court and the district courts shall have power to issue writs of scire facias. The Supreme Court, the Circuit Court of Appeals, and the district courts shall have power to issue all writs not specifically provided for

by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the usages and principles of law."

Where mandamus is in aid of the appellate jurisdiction of the Circuit Court of Appeals, there is no doubt of the court's power to issue it. (U. S. vs. Swan, 65 Fed. 647, 648; Dowagiac Mfg. Co. vs. McSherry Mfg. Co., 155 Fed. 524; Barber Asphalt Pav. Co. vs. Morris, 132 Fed. 945, 952; McClellan vs. Carland, 217 U. S. 268, 279; Barnes vs. Lyons, 187 Fed. 881.) It is not at all necessary that an appeal should actually be pending or that the appellate jurisdiction should actually have been invoked to support an application for a mandamus. The test of appellate jurisdiction in the exercise and aid of which the court of appeals may issue writ of mandamus is the existence of jurisdiction, not its prior invocation.

In Barber Asphalt Pav. Co. vs. Morris, 132 Fed. 945, Judge Sanborn said at page 956 that the test is:

"The existence of a right to review by a challenge of the final decisions or otherwise of the cases or proceedings to which the applications for the writs relate and not the prior exercise of the right by appeal or by writ of error."

See also McClellan vs. Carland, 217 U. S. 268, 279-280.

In the case at bar appellate jurisdiction exists in this court to review any final decree which may

be rendered. If mandamus were not prayed for herein proceedings would be continued under the decree of March 12, 1914, until eventually a final decree would be entered finally adjudicating the rights of all parties. From such a final decree appeal would lie to this court. As we shall show later, this appeal would not be an adequate remedy and a proper case is therefore presented for the issue of a writ of mandamus by this court in exercise of its appellate jurisdiction.

The fact that the appellate jurisdiction is invoked by the application for the writ and, if granted, will settle the controversy as to these parties without further appeal being necessary, does not affect the right of the court to issue the writ of mandamus. There is nothing in Sec. 262 of the Judicial Code that would prevent the issue. On the contrary this court is authorized by the provisions of that section to issue the writ in exercise of its appellate jurisdiction. Moreover, the authorities clearly show that this court has power to issue the writ even where appellate jurisdiction is invoked by the application alone.

In *Barnes vs. Lyons*, 187 Fed. 881 (Circuit Court of Appeals, Ninth Circuit), while the court denied the writ on the ground that the lower court had jurisdiction, Judge Wolverton said, at page 884:

“The principle applicable here, tersely stated, is mandamus will lie to require an inferior court to restore an attorney as a practitioner when the court has exceeded its jurisdiction in striking his name from the roll.”

In the *Barnes* case the court cited as applica-

ble to the Circuit Court of Appeals the principle laid down in *ex parte Crane*, 5 Pet. 190, by Chief Justice Marshall, at page 193, as follows:

“A mandamus to an officer is held to be the exercise of original jurisdiction; but a mandamus to an inferior court of the United States is in the nature of appellate jurisdiction.”

See also Judge Sanborn's review of the authorities in *Barber Asphalt Pav. Co. vs. Morris*, 132 Fed. 945, 952-956, and *In Re Metropolitan Trust Co.*, 218 U. S. 312; *Virginia vs. Rives*, 100 U. S. 313; *Virginia vs. Paul*, 148 U. S. 107; *Kentucky vs. Power*, 201 U. S. 1.

The real inquiry is, should this court exercise that jurisdiction and grant the relief prayed for.

It is well settled that mandamus will issue unless the petitioners have an adequate remedy by appeal. (*United States vs. Swan*, 65 Fed. 647, 649; *in re Winn*, 213 U. S. 458, 466; *re Metropolitan Trust Co.*, 218 U. S. 312, 321.)

The appealability of the decree of March 12, 1914, depends upon whether it possesses the characteristics of finality. If it is final it is appealable to this court (Judicial Code, Sec. 128). If not final, it could be reviewed only after the entry of a final decree. That the latter remedy is not adequate appears clearly from the authorities last cited.

Standing alone the decree of March 12, 1914, is clearly not final, but merely interlocutory. In itself, this decree possesses none of the attributes

of finality. The mere fact that the decree of March 12, 1914, vacates a final decree does not make the new decree final or affect the remedy of mandamus. In the Metropolitan Trust case (*supra*), the later decree vacated a previous final decree, yet mandamus issued.

This aspect of the question determines the issue of the finality of the decree of March 12, 1914, in favor of the proposition that it is not final as to the petitioners. For in determining this question the decree of February 27, 1913, cannot be looked to. The decree of March 12, 1914, cannot be held to derive any attributes of finality from the decree of February 27, 1913. It is true that the decree of March 12, 1914, purports only to "modify" the decree of February 27, 1913; but it is impossible to determine from an inspection of the decree of March 12 in what respect the decree of February 27 is modified and in what respects it is still in force. In reality, the decree of March 12 is not a modification of the former decree at all. The decree of March 12, 1914, is in reality substituted in the place of the decree of February 27, 1913. Actually, the decree of February 27, 1913, so far as its adjudicatory part is concerned, is swept aside and completely nullified. The parts of that decree which remain are obviously not its final attributes; for it is clear from an inspection of the decree of March 12th that the very object of that decree was to deprive the first decree of its final attributes. In fact, an inspection of the decree of March 12, 1914, very clearly shows that the learned court's chief objection to the first decree was that it was beyond the power of the court at the time the first decree was entered to make a final decree.

The nullification of the decree of February 27th is as we have pointed out, accomplished not by a decree which in terms finally adjudicates anything, but what is in fact a mere order which **in effect**, but not in terms, strips the first decree of its attributes of finality, re-opens the cause and refers to a Master to state the account between the two companies and to ascertain and determine the rights of the parties already finally adjudicated by a competent court, while all other questions are expressly reserved until the coming in of the Master's report.

Such an instrument is not a final decree and consequently is not appealable by direct appeal. (Lodge vs. Twell, 135 U. S. 232; Latta vs. Kilbourn, 150 U. S. 524; Parsons vs. Robinson, 122 U. S. 112; Riddle vs. Hudgins, 58 Fed. 490, 493; Grant vs. Phoenix Ins. Co., 106 U. S. 429; Louisiana Bank vs. Whitney, 121 U. S. 284; Green vs. Fisk, 103 U. S. 518, 154 U. S. 668; Clark vs. Roller, 199 U. S. 541; Tally vs. Curtain, 58 Fed. 4; Pittsburgh, etc., Ry. Co. vs. B. & O. R. Co., 61 Fed. 705; Security Trust Company vs. Sullivan, 77 Fed. 778; Denison & N. Ry. Co. vs. Ranney, 104 Fed. 595).

The proceedings initiated by the decree of March 12th may not terminate for several years and the fact that ultimately the petitioners might be able to review it on appeal from the final decree, when rendered, does not render such a remedy adequate in the sense that its theoretical existence deprives the petitioners of a practical and useful remedy by mandamus. Pending the determination of this matter by a final decree, the fund which the petitioners by their diligence rescued

from the hands of the corrupt officers of the defendants will be impaired and disbursed in fees, constituting the cost of this type of administration, while in the end little will remain for distribution to the litigants.

Such a "remedy" is at least not adequate, and its existence will not defeat proceedings for mandamus.

As this court said in *re Winn*, 213 U. S., 458, 466:

"In such a situation the remedy by mandamus is available, although the aggrieved party also be entitled to a writ of error or an appeal.

"Mandamus, it is true, never lies where the party praying for it has another adequate remedy. The writ of mandamus was introduced to supplement the existing jurisdiction of the courts and to afford relief in extreme cases where the law presents no adequate remedy * * *. An appeal or writ of error at the end of long proceedings which must go for naught, is not an adequate remedy."

While we are aware that in *re Winn*, among other cases, was disapproved by the court in *ex parte Harding*, 219 U. S. 363, we do not understand that this portion of it met with the court's disapproval.

See also *United States vs. Swan*, 65 Fed. 647, 649.

We further respectfully submit that as the Supreme Court of the United States was impelled

to grant this relief in re Metropolitan Trust Co., 218 U. S. 312, so this learned court should grant the same relief here.

In the Metropolitan Trust Co. case the Circuit Court vacated an order made at a prior term under the mistaken belief that the court was without jurisdiction when the order was made.

The Supreme Court granted mandamus to set aside the order which vacated the decree in that cause and held squarely that mandamus is the proper remedy where the court has exceeded its power by vacating a judgment after the term.

The case at bar establishes the existence of a proper instance for the exercise of this remedy, extraordinary though it be, and the facts here presented are identical in principle with those existing in the Metropolitan case and clearly show that the petitioners have been unlawfully deprived of their property and that they are wholly without adequate remedy in the premises unless the court will grant the relief prayed for.

We think it clear that it appears from the face of the record that the learned court below, through a misapprehension of its duties and its authority, has already done and, unless restrained by this Honorable Court, threatens in the future to do serious injury to the rights of the petitioners, and that such acts are not mere erroneous rulings which may be adequately reviewed upon appeal, but are dangerous excesses of authority, destructive of the vested property rights of the petitioners and wholly beyond the court's power and jurisdiction.

Since on the face of the record as a matter of law and not as a disputed matter of fact, the District Court is plainly assuming to act and has acted wholly without jurisdiction, and as the petitioners have no other adequate remedy except by mandamus, from this court, leave to file this application should be granted and the rule prayed for should issue.

Respectfully submitted,

WILLIAM M. SEABURY,
Attorney for Petitioners,
Fleming Building,
Phoenix, Arizona.

(With whom John de R. Storey was
on the brief.)

Dated San Francisco, May 4, 1914.

No. 2417.

— IN THE —

United States Circuit Court of Appeals for the Ninth Circuit

IN THE MATTER
of

The Application of JOHN DENNETT,
Jr., Et al., for a writ of Mandamus,
directed to the Honorable WIL-
LIAM H. SAWTELLE, District
Judge of the United States District
Court for the District of Arizona,
and directed to said District Court.

BRIEF OF RESPONDENT.

BRIEF

In Support of Response to Motion for
Leave to File Petition for Writ of Man-
damus and for an Order to Show Cause.

Filed this.....day of....., 1914.

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Clerk

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BRIEF

In Support of Response to Motion for
Leave to File Petition for Writ of Man-
damus and for an Order to Show Cause.

We are instructed by respondent whom we
have the honor to represent in this cause, to
submit this brief in support of the response to
the writ served upon him, upon the true merits
of its case, laying aside such technical objec-
tions as might be raised.

We are heartily in accord with respondent in this view to the end that the rights of stockholders in the Arizona Mutual Savings and Loan Association and the Arizona Trust Company may be determined upon the merits and not upon any question collateral thereto.

SUMMARY OF RESPONDENT'S POSITION.

This suit was originally instituted by Charles W. Clark as a minority stockholder of the Arizona Mutual Saving and Loan Association in behalf of himself and all other stockholders of that association similarly situated, to the end that the transactions set forth in his bill of complaint between the Arizona Mutual Savings and Loan Association and the Arizona Trust Company

“be annulled and declared void and held for naught and to the end that an accounting may be had between the two defendants above named and between the defendant Loan Association and your orator, and others similarly situated * * * that a Receiver be forthwith appointed to take possession of and to marshal the assets of defendant Loan Association * * * to determine the amounts due and owing from defendant Loan Association to your orator and other stockholders similarly situated * * * and for such other relief as to a Court of equity may seem proper.” Folios 105-107 inclusive.

This suit is admittedly a stockholders' suit, brought in equity only because of the impossibility of securing the assent of the directors of either company to the bringing of the suit, and is

brought in a representative capacity, not as an individual, but in behalf of the corporation and of all stockholders in the corporation whose interests were jeopardized who were in any manner affected by the attempted consolidation of the Loan Association with the Trust Company; such consolidation it is alleged in the petition of Clark was void and beyond the

“right, power or authority of the defendant Loan Association or majority of the directors thereof” * * * “in violation of his rights as a stockholder in defendant Loan Association and in violation of the obligation which said defendant Loan Association owed to all stockholders similarly situated, and in violation of the contract which then and now exists between your orator and other stockholders similarly situated, and the said defendant Loan Association.” Folios 82 and 83.

It is further alleged in the complaint of Clark that the attempted transfer was

“in reality a fraudulent scheme improperly to perpetuate the existence of the defendant Loan Association after it had in fact, as heretofore alleged, *become and was insolvent* and was in fact unable to perform and discharge its duties and obligations to its stockholders by reason of defendant Loan Association’s insolvency, and by reason of the fact that said defendant Loan Association had suspended the operation of its said business and had conveyed or attempted to convey among its other assets, its good will to the said defendant Arizona Trust Company

and had in other respects *violated, broken and destroyed its contract* with your said orator above named *and other stockholders similarly situated.*" Folio 84.

In the motion for leave to file petition for writ of mandamus and for order to show cause it is alleged in paraggraph VIII thereof,

"your petitioners who are exchanging stockholders (intervenors) alleged with particular reference to themselves that they have been induced to exchange their said stock by actual misrepresentations made to them by defendants in said cause and for that reason such exchanging intervenors "*sought a rescission of the exchange of stock and a restoration to their original status as Loan Association stockholders, and as such Loan Association stockholders prayed to join with complainant in seeking the relief which said complainant sought.*" Folio 16.

The prayer of the Clark petition asks that the "transactions herein set forth as made between the defendants above named may be declared to be annulled and of no force and effect, and that a restitution of *all* of the assets of the Arizona Mutual Savings and Loan Association from the defendant Arizona Trust Company be adjudged and decreed, and that an accounting between both of the above named defendants be had and taken and an accounting between defendant Loan Association and your orator and other stockholders similarly situated be ordered and decreed." Folio 109.

“and that the affairs of Defendant Loan Association be wound up, its assets marshalled as aforesaid and distributed to those found to be entitled thereto.” Folio 110. |

We submit that the funds of the Loan Association constitute a trust fund in the hands of those in control of its affairs for the benefit of those exclusively entitled thereto.

This is either a stockholder's suit, brought in a representative capacity for himself and all other stockholders similarly situated only because the corporation, for the reasons alleged in the petition is disqualified from suing, in which event and as would be the case if the suit had been in the name of the Corporation instead of a stockholder, the decree should have been in favor of the corporation and for the benefit of all of its stockholders, or

This is a suit brought by intervening stockholders, not in a representative capacity and not for the benefit of the corporation and stockholders, but for the redress of wrongs and the enforcement of rights not given to all stockholders; in this event and only in this event, plaintiff and intervenors in this action can be entitled to a decree for their personal benefit, in which other stockholders similarly situated did not share, or;

This is a creditors suit brought at the expense of and for the benefit of creditors, in which event such creditors as did not present their claims and share the expense of the litigation would not be entitled to the proceeds of the judgment.

If it is a stockholders' suit brought in a representative capacity, theoretically in the name

of and actually for the benefit of the corporation, all stockholders whether assenting or non-assenting, whether guilty or innocent of participation in the acts of the corporate officers sought to be set aside and by the decree declared void, are bound by the decree for the suit is by the Corporation through its stockholders, not only for all stockholders of the corporation but in effect is against the corporation itself, and it is apparent that a stockholder as a plaintiff cannot be held as bound by the terms of the decree and at the same time be precluded from sharing in the benefits.

Moreover the so-called final decree of February 27th, 1913, finds

“that at or about the time (meaning the time when the pretended transfer of assets was made by the Loan Association to the Trust Company) *the defendant Loan Association was insolvent* and unable to meet its obligations to its stockholders as said obligations were accruing.” Folio 276.

And further provides

“That each of said exchanging stockholders be and they hereby are *restored to their original position and status as stockholders of defendant Loan Association, and each of said exchanging stockholders is hereby deprived of his status as a stockholder in defendant Trust Company.*” Folio 281.

We assert, in view of these findings, that a distribution of the assets collected by the Re-

ceiver cannot be made to any stockholder of the Arizona Mutual Savings and Loan Association upon any other basis than that the original complainant and intervening stockholders should pro rate in the assets so collected by the Receiver as their respective interests as stockholders may appear to have been "*in the insolvent Loan Association at the time of the alleged attempted and void transfer,*" for upon what theory may the Receiver be directed to disregard these two findings in the decree and to pay to certain stockholders a fixed and definite sum without such ascertainment?

To permit any stockholder suing in a representative capacity for the corporation and its stockholders to be paid in full the book value of his stock as has been done in the decree of February 27th, 1913, would be to disregard the fact that they were stockholders in the *insolvent* Loan Association and take from the pocket of those for whose benefit this stockholders' suit was instituted a sum of money sufficient to pay in full those stockholders who were his representatives in the bringing of the suit. It is in effect and in fact the entry of a personal judgment in favor of a few stockholders who assume to act for all, and against those stockholders who, relying upon the declaration of the complainant that he was bringing the suit in their behalf, rested secure in the belief that their representative would treat them fairly and justly; this personal judgment so entered in favor of complainant and intervenors and against the other stockholders personally and individually was without process or notice save that given to the corporation of which they were members and for which the

suit was commenced, and this notwithstanding the fact that the contribution from the remaining and unpreferred stockholders comes from them as stockholders in an insolvent corporation to pay in full other stockholders in such insolvent corporation.

This decree was not within the issues of the allegations of the Clark bill of complaint which it must be remembered were adopted in their entirety by all of the petitioning intervenors, but was so clearly without the issues submitted that equity and good conscience made its modification imperative to the end that all stockholders for whom the original bill of complaint was filed should not only be bound by the judgment but should participate in its benefits; that no one or more stockholders of an insolvent corporation should be preferred over other stockholders in such corporation or over creditors of the Loan Association, and that the stockholders of the Loan Association should be, to use the phrasing of learned counsel for the petitioner, "restored to their original status as Loan Association stockholders." The allegation of insolvency in itself precludes the possibility of the intervenors obtaining preference under the decree, because of the fact that if the Mutual Company was insolvent defendant stockholders would have a right to a pro rata only in the assets remaining, whereas the decree, notwithstanding the allegation of insolvency, purports to prefer the intervenors to the extent of paying their subscriptions without depreciation caused by insolvency.

THIS IS NOT A SUIT BROUGHT BY A
DEFRAUDED STOCKHOLDER TO SET

ASIDE A SUBSCRIPTION OF STOCK IN THE TRUST COMPANY, EXCEPT IN SO FAR AS THE SUIT IS BROUGHT TO DECLARE THE TRANSACTIONS BETWEEN THE TWO COMPANIES VOID AND FRAUDULENT AND REINSTATE STOCKHOLDERS OF THE LOAN ASSOCIATION TO THEIR ORIGINAL STATUS IN SUCH ASSOCIATION BEFORE THE VOID AND FRAUDULENT TRANSFER OF ITS ASSETS.

“It is a well established rule of law that a stockholders’ suit to remedy a wrong done to the corporation must be in behalf of all of the stockholdtrs since they are all equally interested in the results of the suit. Accordingly the complainant must bring the suit in behalf of himself and such other of the stockholders as may care to come in.”

Cook on Corporations, 6th Edition, pp. 734, page 2426.

“An injury done to the stock and capital by negligence or defeasance is not an injury to such separate interest, but to the whole body of stockholders.”

Brickerhoff v. Bostwick, 88 N. Y. 52, 105 N. Y. 567; 1 N. E. 667.

Richmond v. Irons, 30 L Ed. 870.

Craig v. Gregg, 83 Penna St. 19.

Deviney v. Hart Coal Co., W. Vir. 68 S. E. 789.

It is held to be

“a fatal defect in the plaintiff’s petition both original and amended that it seeks no recovery on behalf of the corporation but seeks a direct recovery of damages to the plaintiff, the statement not entitling him to such recovery.”

Evans v. Brandon, 53 Tex. 56;
Howe v. Barney, 45 Fed. 668.

“Money or property recovered from directors or other persons in a suit in equity instituted by a stockholder on behalf of the stockholders, belongs to all of the stockholders and not the complaining stockholder; it goes to the corporation, the decree must be for the benefit of the corporation and not for the complaining stockholders.”

Wallace v. Lincoln Savings Bank, 89 Tenn. 630;

Landis v. Sea Isle, etc., 53 N. J. Eq. 654;

Loewenstein v. Diamond Match Co., 94 N. Y. App. 383;

Thompson on Corporations, 6th Ed., pages 4490-91, 4560;

Thompson vs. Stan, 20 N. Y. Sup. 317;

Thompson on Corporations, page 4566.

The relations one with the other of stockholders of a Loan Association are peculiar and differ from the relations of stockholders in other corporations, in that the interest of each stockholder in such Loan Association is mutual and the value of each share of stock depends upon the

mutuality of the contract and upon the observance or non-observance of each other stockholder of his contract of subscription to stock in such an association. This value is influenced by the fact of whether or not, because of the failure to make stated payments any stockholders forfeit their interest in the association, and the amount of money which may have been paid before such forfeiture comes to the Treasury of the company for the increasing of its capital under the head of "lapses." It depends also and varies because a borrowing stockholder may not only forfeit the amount which he has repaid on the sum borrowed, but the security as well, and by diminishing the number of those entitled to share in the assets and earnings, at the same time add to the value and amount of such assets.

"If as a result of the suit money is recovered for the benefit of the company it goes into the corporate treasury as any other funds of the company, and inures to the benefit of all shareholders, those assenting to the suit and those dissenting, those innocent and those guilty. Although this may seem to outrage ones sense of propriety, yet in no other way can legal principle be satisfying and in no other way can so near an approach to perfect justice be attained. In such a case, however, where the money is eventually to be distributed among the share holders the court may order immediate payment to the plaintiff of his share or proportion."

Machen 1185—Cases cited.

“A shareholders’ suit is brought for a wrong to the corporation which but for exceptional circumstances would be the only proper plaintiff. The complaining shareholder should sue as a representative of the aggregate right of the share holders; that is to say, on behalf of himself and all other share holders similarly situated, and hence a bill filed on his own behalf alone would be dismissed.

Machen, pp. 1172—Cases cited.

“The bill may be maintained by one shareholder on behalf of all the others, although some of the latter have acquiesced in the transactions complained of and would therefore be barred from appearing as plaintiffs themselves.”

Machen, pp. 1172.

“Defects in the process or in service constitute the most unquestionable ground for vacation of judgment after the lapse of the term. If there is an entire absence of service of process, and this fact appears by the record or by such evidence as under the practice of the court where the judgment is entered is competent it may be vacated on motion at any time. Though process was served in some manner or was defective in form and the judgment is not therefore absolutely void, it will generally be vacated on motion. While it is universally conceded that a judgment void for want of jurisdiction over the

person of the defendant may be vacated on motion, irrespective of the lapse of time, there is a wide diversion of opinion as to what judgments are void for this reason and as to whether the motion to vacate a judgment is a direct attack upon it so as to warrant the reception of evidence not found in the record, and perhaps inconsistent with that which is to be found there."

1 Freeman on Judgments, 4th Ed. pp. 97-98.
 Cases cited: *People vs. Green*, 74 Cal. 103.
People vs. Mullan, 65 Cal. 396.
Ladd vs. Mason, 10 Ore. 308.
People vs. Pearson, 76 Cal. 403.
Ex Parte Krenshaw, 15 Peters 119.

"If complainant stockholders sue for the restoration of assets of the corporation which have been diverted by its unfaithful directors into their own hands or into the hands of stockholders or strangers in breach of their duty or trust, neither those assets nor any proportion of them can be restored to the complaining stockholders, but recovery must be had in behalf of the corporation, and a receiver will in a proper place be appointed to take charge of and administer them.

Thompson on Corporations, pp. 4560-4490 and 4491.
Thompson vs. Stanley, 20 N. Y. Sup. 317.

"It will frequently happen that a majority of the shareholders are in a fraudulent conspiracy against the rights of the minority. The minority or one of the minority suing for

himself and others in like situation with him may file the bill. Where the bill is thus filed it is not necessary that the share holders should be made party by name, nor is it an objection that some of the share holders have become adversely interested."

Thompson on Corporations, pp. 4566.

"Where the action is brought to undo frauds already committed and to restore to the corporation assets wasted, the action does not proceed in right of the stockholders but it proceeds in right of the corporation, and consequently whatever is restored accrues to the corporation, and the law at once attaches to it the character of a trust fund for the creditors of the corporation first, and for its stockholders next, in which all are to share ratably and in respect of which no one gets a preference over the other, not even the stockholder who takes upon himself the burden of prosecuting the suit which results in its restoration."

Thompson on Corporations, pp. 4491.

Slattery v. St. Louis & T. Co., 94 Mo. 217,
4 S. W. 79.

COUNSEL FEES.

We had insisted that this suit is a stockholders' suit brought in a representative capacity by the original complainant for himself and stockholders similarly situated, being stockholders of the Mutual Loan Association and as such entitled to all of the rights, privileges and prop-

erty as a stockholder in defendant Loan Association, including the right of complainant and intervenors to participate in all of the assets of defendant Loan Association and upon the distribution thereof to receive such, if any, property as may remain undisturbed as the property of defendant Loan Association after defendant Loan Association had discharged all of its obligations to its stockholders in paying off and discharging such stock therein as may have matured and become due and payable from said defendant Loan Association to the members entitled thereto. That complainant recognized the necessity of suing in such capacity and for such purposes is evidenced by the contents of Paragraph IV of his petition, folio 73.

In this capacity and seeking this relief the rule is well established that a stockholder being successful in the litigation should be allowed counsel fees out of the fund recovered; that is to say, all the stockholders of the corporation receiving the benefits of the litigation should share in the payment of the expenses incident thereto.

It was doubtless upon this theory and under this rule that the expenses of the litigation were sought to be allowed in the decree of February 27th, 1913. Nor can we believe it was ever the intention of the learned Judge presiding in the Court below on this date that counsel fees were to be paid out of the common fund belonging to all stockholders without requiring the original complainant and intervening stockholders to pro rate in such payment. That this has been done is evident from the terms of the decree of February 27th, 1913, allowing to each intervening

stockholder the amounts alleged by each intervenor to have been the total amount paid on account of the purchase price of stock.

If this is a stockholders' suit brought for the benefit of all stockholders, this expense should be paid out of the stockholders' common fund, thus reducing the share of each stockholder in the distribution of the remaining fund by an amount proportioned to the amount he has paid in. If this suit is a suit brought by individual stockholders, having an individual right accruing to them as distinguished from stockholders not named as intervenors, it seems too clear for argument that an amount should have been set aside from the fund aggregating the total amount paid in by all intervening stockholders, out of which fund recovered for their individual benefit they should be compelled to pay the expenses of litigation. Any other method would be equivalent to a personal action by the intervenors and the judgment against such non-intervening stockholders to be paid by them not only in the full amount, but including counsel fees (presumably due on account of individual contracts) as well as the ordinary expense of litigation, and this without reference to the rights of holders of matured stock, which matured stock as noted by reference to the bill of complaint above referred to is by Clark himself recognized as having a priority of lien upon the fund recovered and for which Clark sets up no claim. Folio 73-74.

We do not wish to be understood as contesting the amount of the decree of February 27th, 1913, allowed to the able and distinguished counsel who up to this date had participated in this

litigation, save upon the ground that such compensation should not and cannot be allowed except upon the theory that if allowed out of the common fund belonging to the corporation, stockholders of the corporation in whose name and for whose benefit the decree was rendered should not be compelled to participate in the payment of this compensation and be denied the benefits of the decree. We assert that there is a complete unanimity of authority that costs payable by the complaining stockholders are payable by them per capita and not pro rata, according to the amount of stock held by each.

Edwards vs. Bay State, etc., 130 Fed. 242.

It is stated in Cook on Corporations, 6th Ed., to be the rule that

“Inasmuch as the suit is for the benefit of all of the stockholders, and inasmuch as the results of the suit belong and go to the corporation, it is right that the expenses of counsel fees and other disbursements of the suit should be paid by the corporation, provided the suit so instituted is successful. The proceeds of a stockholders’ suit belong to the corporation, less a reasonable allowance for the plaintiff for his costs, disbursements and attorneys’ fees.”

Cook on Corporations, 6th Ed., Paragraph 879, page 3160-61.

Citing Fox v. Ehle, 108 Cal. 475.

Meeker v. Winthrop Iron Co., 17 Fed. 48.

Trustees v. Green, 105 U. S. 527.

Central R. R. Co. v. Pettus, 113 U. S. 116.
Forrester v. Boston Co., etc., 74 Pac. 1088.
4 Thompson on Corporations, Para. 4491.

On page 6 of the brief of petitioner is contained the statement

“The complainant and intervenors represented all the stockholders of the Loan Association having representative character to bind all those of the same class.” Citing Lamar v. Hall, 129 Fed. 79-83.

In view of the fact that the decree of February 27th, 1913, allowed to counsel for the petitioner a fee to be paid out of the stockholders' common fund, thus recognizing the suit was brought for all of the stockholders, and not for those of a class, we deem the following quotation from the opinion in Lamar vs. Hall *supra* to be particularly applicable to the facts of the case at bar, as follows:

“It may be stated as a general and unquestioned principle that each client should compensate his own solicitor and that an attorney cannot make another person his debtor by voluntarily rendering services in his behalf without his express or implied consent. The cases which allow compensation to attorneys out of a trust fund are not in conflict with this principle, but are founded upon it, for they depend upon the principle of agency, the actual plaintiff being the representative of the beneficiary of the trust * * * only jointly interested with others in trust property who in good faith maintains for himself

and others interested like him, the necessary litigation to save it from waste and to secure its proper application is entitled to the reimbursement of his interest *as between solicitor and client out of the fund to be administered.*"

The fund to be administered in the case at bar is as we have before stated, either first the fund set aside in a sufficient amount to reimburse intervenors to the full extent of the amount by them paid in upon their stock subscription, or second, it is the common fund in which all stockholders, whether participating or non-participating, guilty or innocent of the acts complained of, are interested to the same extent as is the petitioner who sued in a representative capacity.

By this decision the Court was without jurisdiction, except upon the theory that this was a stockholders' suit brought for the benefit of all stockholders of the Loan Association, to allow counsel fees out of the general fund in fulfillment of an implied or expressed contract made by intervening stockholders to pay counsel out of the fund which might be recovered for their personal benefit.

In further support of our contention that the Court was without jurisdiction to enter the decree of February 27th, 1913, we refer to the case of *Sullivan v. Stukey*, 86 Fed. 491; *Lewis v. Clark*, 129 Fed. 570, and *Toll v. American, etc., Society*, 61 Fed. 446. These authorities were cited in support of the statement made by counsel

"that the insolvency of the Loan Association

terminated the contract between it and its members."

Before further quoting from this case, it seems an opportune time to again call to the attention of this Court the admission contained in the brief that the Loan Association was on the date of the attempted transfer of its assets, insolvent; we at this time again request the Court to consider the anomalous position occupied by a stockholder who claims the right under a decree not only to have expenses and counsel fees of his private litigation paid by other stockholders in the Loan Association, but, without regard to the rights of stockholders whose stock has matured and who have thus become creditors instead of stockholders (as admitted by Clark, the original petitioner), and other creditors, if any there might be, and with regard to the possible contingency of some of the intervenors having been borrowers from the stockholders' fund, to be paid the full amount of his investment in an admittedly insolvent corporation.

Returning to the cases cited, the case of Sullivan v. Stukey *supra* is a direct contradiction of this asserted right in that it holds that under any of the three contentions made in behalf of the rights of stockholders of an insolvent building and loan association all stockholders are on an equality. Lewis v. Clark *supra*, while sustaining the statement contained in the brief that the insolvency of a Loan association terminated the contract between it and its members, also contains the statement quoted from page 573 that

“The share holders in associations of this character are not in the ordinary sense creditors, and if deemed creditors in any sense they are necessarily subject to all equities existing between themselves.”

The case of Toll v. American, etc., Society, *supra*, in a concise and full opinion rendered by Judge Grosscup involving the direction of that Court regarding terms on which the borrowers of the association might repay their loans and also the claims which the Receiver should advance on like actions in case of compulsory foreclosure contains the following language:

“The first question is whether he (the stockholder) is entitled to a credit for the amount of the assessments paid upon his stock. I think not. Such a credit practically would be paying par on his stock and *a preference over other stockholders to which clearly he is not entitled.*”

On page 7 of petitioners' brief in support of that portion of the decree of February 27th providing that all stockholders of the Loan Association should receive in full the amount they had paid into the failing enterprise, the somewhat novel suggestion is made that because the particular stockholders, suing as intervenors in the original complaint and adopting all of the averments of the original complaint, surrendered the benefits of their contracts with the insolvent Association, which contracts promised to pay them at maturity, approximately one thousand dollars for every six hundred dollars paid in, and also

surrendered the interest on their payments this generous concession to the rights of the other stockholders in the insolvent Loan Association should be considered as a sufficient contribution to the losses of the enterprise as to warrant the Court in repaying to them in full and exclusively all other sums paid in, less the amounts surrendered, and out of the common fund which, except for this remarkable claim of justification, would under all of the authorities upon which a stockholders' suit can be instituted go to all of the stockholders in proportionate amounts.

It is not surprising that even the recognized ability and industry of learned counsel for petitioner has been unavailing in the citation of a single authority to support this argument. Certain it is that the cases cited under this paragraph of the brief on page 8 do not support the contention. The citation given on this page of the brief will be found upon examination to deal with the rights of creditors one as against the other to payment out of a certain fund. As a matter of fact, while the original suit was by a perfect bill of complaint commenced by Clark, the original complainant suing as a stockholder for the benefit of all stockholders of the Loan Association who were injured by the void, fraudulent and attempted transfer by the Association to the Trust Company of its assets, each intervening petition, word by word and step by step departed from the result originally sought to be obtained, until by the so-called final decree of February 27th, 1913, the proceeding was transformed from a suit brought by the Corporation for the benefit of its stockholders, to a suit brought by stockholders as creditors for the re-

dress of a private wrong and the enforcement of a private right claimed to be not common to other stockholders.

So far as it may be determined from the pleadings and from the decree of February 27th, 1913, the only justification for this departure is based upon the claim that because those stockholders not named as intervenors did not permit their names to be used, they should for this reason be deprived of their status as plaintiffs and of their right to share in the benefits obtained by the decree. Not only is this true but they are burdened with the payment of several thousands of dollars expended in the employment of eminent counsel and unnecessarily expensive litigation for the individual benefit of those who at the most were merely formal parties to the suit.

The intervenors in this suit adopted all of the averments of the original bill of complaint. The intervening petitions were unnecessary except to confer upon the intervenors the right to assist in the control of the litigation. Especially is this true in the case at bar where the intervenors by adopting the allegations of the bill of complaint filed by Clark align themselves as plaintiffs in the action.

The office and the rights of an intervenor in support of a proceeding in equity are well stated in the case of *Brickerhoff v. Bostwick*, 1 N. E. Rep. 667. This was an action commenced by plaintiff as a stockholder suing in his own behalf and for the benefit of other stockholders of a national bank in which other parties intervened. While this case is cited by us for the purpose of defining the rights of intervenors it is also applicable to the claim made by peti-

tioner that all stockholders of the Loan Association not intervening are barred by laches from claiming the right to participate in the decree, in that the case holds that the action being brought in a representative capacity, all stockholders as well as the nominal plaintiff were before the Court, and unless the action of the original plaintiff was barred by laches, the action on the part of those stockholders similarly situated would not be barred.

The case of *Brickerhoff v. Bostwick*, 1 N. E. 667, contains the following language:

“The action was commenced by Theodore Brickerhoff, suing on his own behalf and for the benefit of the other stockholders of the bank; and therefore, for the purpose of the statute of limitations, the action must be treated as if all the stockholders were plaintiffs. The action is really the action of all the stockholders, as it was necessarily commenced in their behalf and for their benefit. It could not have been commenced by one stockholder for himself alone. It is true that at any time before judgment the original plaintiff, before the others were made parties, could have discontinued the suit, or could have settled his individual damages with the defendants, and have executed a release which would have been effectual as to him. But if he had prosecuted the action to judgment, then the judgment would have been for the benefit of all the stockholders, and he would then have ceased to have control over it, because the rights of the other stockholders would at once have attached

thereto. The bringing of the action by this original plaintiff did not prevent the other stockholders from bringing similar actions; but the moment a judgment should be recovered in one action for the benefit of all the stockholders, the proceedings in all the others would be stayed. *Innes v. Lansing*, 7 Paige, 583. In this case, therefore, it was not necessary that the other plaintiffs should have been joined as nominal plaintiffs. The suit could have gone to judgment without their presence as nominal plaintiffs, but the judgment would have been just as effectual and just as beneficial for them as if they had been actually named as parties plaintiff. The suit having been commenced for their benefit, in which full and adequate relief could have been given to them, their rights would not have been barred by any lapse of time if they had not come in as plaintiffs. There was no purpose in their becoming nominal plaintiffs, except that they might have some control of the action, and thus be present to protect and secure their rights, and to prevent a discontinuance of the action by the original plaintiff."

JURISDICTION OF THE COURT TO ENTER DECREE OF FEBRUARY 27.

"It is a general rule, well established that after a term has ended, all final judgments and decrees of the Court pass beyond its control unless steps be taken during that term by motion, or otherwise, to set aside, modify or correct them; and if errors exist they can

only be corrected by such proceedings by a writ of error or appeal as may be allowed in a court which by law can review the decision. So strongly has this principle been upheld by this Court that while realizing there is no court which can review its decisions, it has invariably refused all applications for rehearing made after the adjournment of the court for the term at which the judgment was rendered, and this is placed upon the ground that the case has passed beyond the control of the court." *Bronson v. Schulten*, 104 U. S. 410, 26 L. Ed. 797.

To this general rule there are well recognized exceptions to the effect that while the general rule is applicable to cases at law a judgment or decree which under the general rule has become final by the expiration of the term, may be modified after the term and purged of errors or reversed by proceedings for error in fact. The exception to the rule is stated by Mr. Justice Curtis in the case of *Hendrickson v. Henckley*, 17 How. 443, 15 L. Ed. 123, as follows:

"A court of equity does not interfere with judgments at law unless the complainant has an equitable defense of which he could not avail himself at law because it did not amount to a legal defense at law which he was prevented of availing himself of by fraud or accident unmixed by negligence of himself or his agents."

Upon the question of the jurisdiction of the Court to enter the decree of February 27th,

1913, the position taken by respondent is as follows:

A Court only acquires jurisdiction according to the established modes covering the class of case to which it belongs, and an erroneous judgment can be attacked collaterally. One not a party to a judgment cannot appeal therefrom and it follows that such a one is not bound by the judgment because of the fact that he is not a party. Where one is sought to be bound by a judgment it must appear that he is a party, and if by the terms of a judgment it is sought to bind him by it he is a necessary party and as such should be brought into Court in order that he may have his day and have his rights litigated. Bare notice or actual knowledge of the pending litigation is insufficient, for where a party is necessary to the adjudication of a cause he must be brought into court by a process of the court. Under the decree in this case the judgment being for the personal benefit of the intervening stockholders and against the interests of those stockholders not intervening, we submit that such non-intervening stockholders were necessary parties not brought before the court by process or at least so far as they are concerned, the decree of February 27th cannot be considered a final decree because it could not be adjudicating their rights for the purpose of rendering a final judgment against them without their presence in court; as to such non-intervening stockholders the decree of February 27th, 1913, is interlocutory; the proceeding in this cause being equitable and the court having taken possession of the property for the purpose of conserving the interest of the petitioners and

those similarly situated, an order made by the court which does not so conserve the interest of all stockholders is made without jurisdiction. The petition is based upon equitable rights, the relief sought is equitable, the judgment of the court does not follow equity by preferring a portion of the stockholders of the same class as against the remainder. The judgment is in law rather than in equity and is therefore entered without jurisdiction.

“A court has no power to render judgment respecting a matter not submitted to it for decision though such judgment is pronounced in an action involving other matters which have been submitted to it for decision and over which it has jurisdiction.” Freeman on Judgments, 4 Ed. para. 120, page 185.

In an opinion by Mr. Justice Brewer the rule is stated to be that:

“A judgment for the recovery of the possession of real estate rendered in an action whose pleadings disclose only a claim for the possession of personal property cannot be sustained, although personal service was made upon the defendants.”

Reynolds vs. Stockton, 140 U. S. 254, 35 L. Ed. 464.

By the same reasoning the Court was without jurisdiction to render the decree of February 27th, because of the fact that the suit was brought by Clark in a representative capacity for all stockholders similarly situated; that is

to say, for all stockholders whose rights under the contract with the Loan Association had been impaired by the void, attempted transfer of the assets of the Loan Association to the Trust Company, and the decree purports to adjudicate the rights of petitioners and intervenors in their capacity as individuals, taking away from the corporation itself and stockholders similarly situated with the intervenors the benefits of the judgment.

The case of *Reynolds v. Stockton* supra involved the jurisdiction of the Court in a stockholders' suit brought for the purpose of securing the reconveyance of personal property from one corporation to the complaining corporation, to enter a judgment so affecting the issues presented by the petition as to adjudge also the return of all real property. It was held in this case that the Court had no jurisdiction to enter a judgment affecting the real property because such an adjudication was not within the issues of the suit and

“the rule is universal that where defendant appears and responds only to the complaint as filed and no amendment is made thereto the judgment is conclusive only so far as it determines matters which by the pleadings are put in issue.” * * * * “The inquiry is, had the Court jurisdiction in the extent claimed? Jurisdiction may be defined to be the right to adjudicate concerning the subject matter in the given case. To constitute this there are three essentials: First, the court must have cognizance of the class of cases to which the one to be adjudged belongs;

second, the proper parties must be present; and third, the point decided must be, in substance and effect, within the issue. That a court cannot go out of its appointed sphere and that its action is void with respect to persons who are strangers to its proceedings, are propositions established by a multitude of authorities. A defect in a judgment arising from the fact that the matter decided was not embraced within the issue has not, it would seem, received much judicial consideration. And yet I cannot doubt that, upon general principles, such a defect must avoid a judgment."

In this case the language of Mr. Justice Campbell in *Washington Hackett Co. v. Sickles*, 65 U. S. 333, 16 L. Ed. 650-53, is quoted with approval as follows:

"The essential conditions upon which the exception of the *res judicata* becomes applicable are the identity of the thing demanded, the identity of the cause of the demand and of the parties in the character in which they are litigants."

Applying this rule to the case at bar we submit that the decree of February 27th, cannot bind the non-intervenors because of the fact that while there was an identity of the demand and of the parties in the character in which they were litigants as set forth in the petition of Clark there was no such identity of demand or of the parties litigant set forth either in the petition of the intervenors or in the judgment rendered for their especial and individual benefit.

To the same effect the rule is even more vigorously stated in *U. S. v. Walker*, 109 U. S. 267, 27 L. Ed. 927, as follows:

“Although a court may have jurisdiction over the parties and the subject matter, yet if it makes a decree which is not within the powers granted to it by the law of its organization, its decree is void.”

Citing with approval the language in the well known case of *Windsor v. McVeigh*, 93 U. S. 274, 23 L. Ed. 914, in which Mr. Justice Field after a review of the cases bearing upon this subject announced the decision of the Court as follows:

“The doctrine invoked by counsel that when a Court has once acquired jurisdiction it has a right to decide every question which arises in the case and its judgment, however erroneous, cannot be collaterally assailed is undoubtedly correct as a general proposition but is subject to many qualifications in its application. It is only correct when the Court proceeds after acquiring jurisdiction of the cause according to the established modes covering the class to which the case belongs and does not transcend in the extent or character of its judgment the law which is applicable to it.

“To a bill for the dissolution of a corporation and an accounting filed for the benefit of a single stockholder not on behalf of the rest, the other stockholders or their representatives must be made defendants.”

Fosters Federal Practice, 4th Ed., p. 342.

Citing *Watson v. U. S. Sugar Refining Co.*,
68 Fed. 769.

The case at bar among other things is an action for an accounting. The decree of February 27th directs an accounting. The original bill of complaint prayed for an accounting between the Loan Association, the Trust Company and stockholders of the Loan Association similarly situated with the complainant. In so far as the decree purports to direct an accounting for the benefit of all stockholders it is within the rule laid down in *Fosters Federal Practice*, *supra*. In so far as the decree purports to direct an accounting only as between the intervening stockholders and not on behalf of the rest, other stockholders or their representatives, under the above rule, must have been made defendants. This not being done the other stockholders affected by the decree have not had their day in court.

[To the effect that a cause of action where the relief sought is personal as distinguished from general relief sought on behalf of all stockholders is a misjoinder to such an extent as will not permit a judgment in favor of the complaining stockholder not participated in by the other stockholders citation is made to *Metcalf vs. American School Furniture Co.*, 108 Fed. 909. In this case a minority stockholder in the corporation sued in behalf of herself and other stockholders similarly situated to set aside an alleged transfer of property of the corporation in pursuance of conspiracy between its officers and the transferee where it is alleged the corporation

on demand has refused to bring suit and also seeks the recovery of treble damages under the anti-trust act. It is declared to be multifarious, since such damages are only recoverable in an action at law by the plaintiff as an individual and not as a stockholder, while the relief prayed for is in behalf of the corporation and if granted would inure to the benefit of all the stockholders.

“In the absence of fraud or collusion an intervening defendant can ordinarily set up no defense of which the original defendant could not have availed himself, nor can an intervening complainant contest the general object of the suit.”

Fosters Federal Practice, 4th Ed., p. 673.
Citing *Forbes v. L. P. and Pacific Railroad*,
2 Woods, C. C. A. 323.

ALL STOCKHOLDERS OF ARIZONA MUTUAL BELONG TO SAME “CLASS.”

“Upon general principles if the party named as plaintiff who sues in behalf of himself and others fails in his suits, those whom he represents must also fail, for the rights of those represented can rise no higher than those named as plaintiffs.” *Quinlin v. Meyers*, 29 Ohio St. 500-10.

Conversely it must be true that the rights of intervenors are dependent upon the relief prayed for in the original suit, professedly in this case being brought for Clark and all other stockholders similarly situated; the intervenors

would be entitled to no other relief or to any higher relief than might have been granted had the suit been prosecuted in the name of Clark as nominal plaintiff on behalf of and for the benefit of stockholders in the Loan Association similarly situated. By the phrase "similarly situated" is meant not those stockholders who are the nominal parties to the suit but all stockholders who at the time of the commencement of the suit were similarly situated in their contractual relations with the Mutual Company as was Clark. If in this case the directors of the Loan Association, fraudulently and collusively combining with the directors of the Trust Company entered into a contract and agreement which from its inception was void as being a breach of the trust relation imposed upon them by virtue of their offices as directors, the entire transaction as is alleged in the bill became void, not only as to Clark but as to all who were stockholders in the Loan Association at the time of the alleged, attempted fraudulent transfer. From this point of view there could be no such thing as "assenting" or "non-assenting" stockholders because of the legal impossibility of an assent by either class of stockholders to an act void in law. Indeed we believe it may be stated as a rule which will not be denied by petitioner that his standing in this court of equity rests upon the statement contained in the pleadings that the suit is brought in a representative capacity for the benefit of the corporation and its stockholders.

Upon the authority of a statement made by counsel for intervenors in one of the briefs submitted during this litigation filed October 16th, 1912, marked for identification in the office of the

Clerk of the U. S. District Court, file "No. 53."

"the admitted facts show that the acquisition of the assets of the Loan Association by the Trust Company was and is illegal. This in effect has been twice judicially decided in this cause, once by Judge Morrow and once by Judge Sloan."

This statement by counsel for petitioners is sustained by the decree of February 27th, in which it is found that the entire transaction between the directors of the Loan Association and the directors of the Trust Company was fraudulent and void. The petition of Clark upon its face is a disclaimer of any voluntary participation of any stockholder of the alleged fraudulent acts. There is no claim that the acts alleged to be fraudulent were voidable. On the contrary, the distinct allegation is that the transfer of the stock of all Loan Association stockholders was beyond the power of the Loan Association to effect under the contract between the stockholders and the Loan Association. That such attempted transfer was in breach of the trust relations which the directors of the Loan Association bore to its stockholders and was accomplished by such fraudulent misrepresentations as to render the transfer void ab initio.

The true test as to whether a suit should be brought by a stockholder in his individual right or in a representative capacity is said to be as follows:

"Is the complainant affected only as every

other shareholder is affected, or is he affected in some manner peculiar to himself."

Machen on Corporations, para. 1152.

Converse v. United Shoe Co., 185 Mass. 422;
70 N. E. 444.

Miles v. N. Y., etc., Ry. Co., 176 N. Y. 119;
68 N. E. 142.

Lawrence v. Curtis, 191 Mass. 240.

Wells v. Dane, 101 Maine 67; 63 Atl. 3242.

Bigelow v. Calumet Mining Co., 155 Fed. 869.

In the case at bar under the facts pleaded, the interest of all stockholders of the Loan Association are affected equally. Any transfer of any portion of the assets of the Loan Association lessening the value of the stock of one stockholder must have a like effect upon the stock of every other stockholder and this whether the holder of stock assented or refused his assent to such transfer. Any misappropriation of the funds of the Loan Association by its officers had an equal effect upon the value of all stock. Every act of mismanagement entailing an unwarranted expenditure of money affected the rights of all stockholders and the value of all stock and in no manner are the intervenors affected except as every other shareholder is affected, unless indeed as results from the decree of February 27th, 1913, the shares of the intervening stockholders are unwarrantably and unduly enhanced in value by a distribution of all of the assets in the corporate fund to the intervenors and to the exclusion of the other share holders.

[The original action commenced by Clark is predicated upon the assumption that the at-

tempted transfer of assets from the Loan Association to the Trust Company was void ab initio and deprived him and other stockholders of the Loan Association without respect to the class of stock held by them, of their rights as stockholders in the Association.

The intervening petitions attempt to place petitioners in a class by themselves resting only upon the fact either that they never exchanged their stock for stock of the Trust Company, or that having exchanged they had rescinded their action. The intervenors pray for and are granted relief in an action accruing to themselves personally, arising out of an action necessarily based upon the claim that the entire transaction was void. We submit that the cause of action attempted to be sued upon by the intervenors results in a joinder of a cause of action accruing to themselves personally with the cause of action brought by Clark on behalf of the Company and other stockholders against the same parties defendant. That this cannot be done and the Court was without jurisdiction to enter a decree in favor of the intervenors personally and against the corporation and non-intervening stockholders. That the authority to enter such a decree, the effect of which as we have before stated is a personal judgment in favor of some stockholders as against the other stockholders in a suit against the same defendant corporation, must rest upon the issuance of a valid process giving to such non-intervening stockholders their day in court. That such a joinder of causes of action is multifarious and cannot be maintained in a Court of Equity. In support of this statement we cite:

Cook on Corporations, 6th Ed., para. 739,
pages 2462-2463. |

Whiteney v. Fairbanks, 54 Fed. 985.

Farrow v. Holland Trust Co., 74 Hun. 585.

Metcalf v. American School Furniture Co.,
108 Fed. 909.

In concluding this Brief we earnestly join with the petitioner and his counsel in praying the judgment of this Court that Charles W. Clark, who brought the original action against the defendant corporations, and the intervening petitioners who adopted the bill of complaint filed by Clark in its entirety, should be granted the relief in that bill prayed for to the end that petitioner Clark and all other stockholders of the Loan Association whose representative he was, and intervenors should be restored to the status which on the date of the attempted transfer of assets from the Loan Association to the Trust Company they occupied as stockholders in the insolvent Mutual Loan Association; that the assets fraudulently, unlawfully and in excess of the powers conferred upon the Board of Directors of the Loan Association attempted to be transferred to the Trust Company shall be marshalled by the Receiver and distributed to the persons properly entitled thereto; that the creditors, if any, of the Loan Association shall be paid, the surplus distributed to its stockholders as their respective interests may appear, and the remainder, if any, be used in the payment of debts of the Trust Company first and distributed to the stockholders of the Trust Company thereafter, which stockholders, according to the prayer of the Clark petition, and because

the attempted transfer of the assets of the Loan Association was an act void ab initio, excludes all stockholders of the Loan Association whose stock was by the void act attempted to be transferred.

Respectfully submitted,
GEORGE J. STONEMAN,
Phoenix, Arizona.
REESE M. LING,
Phoenix, Arizona.
O. T. RICHEY,
Phoenix, Arizona.
BENTON DICK,
Phoenix, Arizona.
J. E. MORRISON,
Phoenix, Arizona.
R. E. MORRISON,
Prescott, Arizona.
Attorneys for Respondent.

9
NO. 2417

IN THE
United States
Circuit Court of Appeals
For the Ninth Circuit

In the Matter of the Application of
JOHN DENNETT, JR., et al., for
Writ of Mandamus Directed to the
HON. WILLIAM H. SAWTELLE,
District Judge of the United States
District Court for the District of Ari-
zona, and Directed to said DIS-
TRICT COURT.

Demurrer to Respondent's Return
and Petitioners' Reply Brief

Filed

OCT 13 1914

F. D. Monckton,
Clerk.

WILLIAM M. SEABURY,
Solicitor for Petitioners,
Fleming Building,
Phoenix, Arizona.

*United States Circuit Court of Appeals for the Ninth
Circuit*

In the Matter of the Application of
JOHN DENNETT, JR., et al., for
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HON. WILLIAM H. SAWTELLE,
District Judge of the United States
District Court for the District of Ari-
zona, and Directed to said DIS-
TRICT COURT.

DEMURRER.

Comes now John Dennett, Jr., and each and all of the petitioners herein and respectfully demurs to the return of the respondent filed herein, upon the ground that the said return fails to state facts sufficient to constitute a return to the order to show cause heretofore and on or about May 21st issued herein and directed to the respondent requiring said respondent to show cause, if any there be, why a mandamus should not issue to induce said respondent to expunge from the records of the court below a certain decree entered therein in the case of Clark against the Arizona Mutual Savings and Loan Association and the Arizona Trust Company, on March 12, 1914.

And petitioners demur to said return upon the ground that it affirmatively appears from the face thereof that the petitioners are and each of them is entitled to the relief prayed for herein.

WHEREFORE, your petitioners and each of them respectfully pray that a peremptory writ of mandamus issue out of this court as prayed for in the petition heretofore filed herein.

WILLIAM M. SEABURY,
Solicitor for Petitioners,
Fleming Building, Phoenix, Arizona.

*United States Circuit Court of Appeals for the Ninth
Circuit*

In the Matter of the Application of
JOHN DENNETT, JR., et al., for
Writ of Mandamus Directed to the
HON. WILLIAM H. SAWTELLE,
District Judge of the United States
District Court for the District of Ari-
zona, and Directed to said DIS-
TRICT COURT.

PETITIONERS' REPLY BRIEF

This proceeding is now at issue before this Court upon the petition and the exhibits attached thereto for an order which issued out of this court on May 21, 1914, requiring the court below and the Honorable Judge thereof to show cause why a mandamus should not issue to require the court below and the Honorable Judge thereof to expunge from the records of the court a certain alleged decree entered in the case of Clark against the Arizona Mutual Savings and Loan Association and the Arizona Trust Company on March 12, 1914, and upon the return of the respondent to the order to show cause, which return was filed herein on or about September 21, 1914, and also upon the demurrer of the petitioners which has been duly interposed to said

return, which demurrer is based upon the ground that said return is insufficient to constitute any cause why the relief prayed for in the petition should not be granted.

The issue presented for determination by this learned court is, therefore, one purely of law and not of fact. It presents for review the single question whether the court below had jurisdiction to nullify the decree of February 27., 1913, after the expiration of the term at which that decree was entered in the court below.

The argument advanced by the learned respondent in the second opinion, which after the institution of mandamus proceedings was written for the purpose of lending additional support to the decree of March 12, 1914, and by the brief of the learned counsel for the respondent, is an endeavor to induce this court to review the merits of the decree of February 27, 1913, as though that decree were before this court now upon an appeal duly taken therefrom both by the respondent and by the litigants affected thereby.

The difference between the functions which may lawfully be performed by a mandamus directed to the court below, and which are performed in this court, upon the review of a final decree in equity upon an appeal are too well known to require discussion before this learned court. We desire only to point out that the learned respondent seeks to convert this proceeding by mandamus

into a proceeding to review the merits of the decree of February 27th, 1913, as upon an appeal.

No Appellate Court ever permits a petitioner to use the extraordinary writ of mandamus as a means of reviewing ordinary alleged error committed by the court below, and we are confident that this court will not permit the respondent to convert this proceeding into an appeal from the decree of February 27, 1913, especially when it is recalled that the time in which to prosecute an appeal from the decree of February 27, 1913, has long since expired and the only parties affected thereby were entirely satisfied with the merits of that decree and never prosecuted an appeal therefrom or took any steps for the purpose of reviewing it before this or any other appellate tribunal.

Before approaching a discussion of the second opinion of the learned respondent, written in support of the decree of March 12, 1914, and before responding to the brief of our learned opponents, we desire to call attention briefly to two matters which we regard of consequence in the consideration of this subject.

We respectfully direct the court's attention to the persistent refusal on the part of the learned respondent and of his counsel to recognize the fact that all of the stockholders of the Loan Association were in reality protected on a basis of complete equality by the decree of February 27, 1913.

There are repeated and constant references to the rights of "other" stockholders than those named in the final decree of February 27, 1913, when in reality, as the record shows, there were no other stockholders of the association than those specified in the decree of February 27, 1913.

Indeed, in an effort to support the validity of the decree of March 12, 1914, it is said that the record shows that those given a lien by the decree of February 27, 1913,

"are not the only persons who are stockholders of the Loan Association and, therefore, entitled to share in its assets."

But the contrary is the fact.

The record does show expressly and by clear and unequivocal intentment that the decree did provide for every stockholder of the Loan Association. Thus paragraph 7 of the decree (Record page 94) is as follows:

"And to the end that the rights of *all* of the intervenors and of the outstanding stockholders in the defendant Loan Association, who never exchanged their stock therein for stock in the Trust Company, may be adequately preserved and protected, * * etc."

This, of course, means all of the outstanding stockholders of the defendant Loan Association.

And paragraph 8 of the same decree (Record page 94) says:

"And for the further protection of the rights of the said intervenors and the said stockholders in the Loan Association, who never exchanged their stock therein for stock in the Trust Company, the Court adjudges and determines * * * " etc.

Then follows a list of those who constituted all of the stockholders of record in the defendant Loan Association at the time of the entry of the decree of February 27, 1913, and yet the learned respondent says that it appears of record that all of the stockholders of the defendant Loan Association were not similarly treated in the decree of February 27, 1913.

It appears from the affirmative statement of the proposed intervenors that they only claim the right to be stockholders in the Loan Association after they have secured permission of the court to rescind the transaction whereby they voluntarily surrendered their status as Loan Association stockholders and became stockholders in the defendant Trust Company.

Thus it appears in paragraph 2 of the petition of Waring et al. to intervene (Record page 115):

"That all of your petitioners, except John Wagner, have been stockholders in the Arizona Trust Company since about the 1st day of May, 1912, and that your petitioner, John Wagner, has been a stockholder in the Arizona Mutual Savings and Loan Association since about the 1st day of April, 1911."

Likewise the "Fourth," "Fifth" and "Sixth" prayers of the petition of the proposed intervenors, praying for

the recision of their status as stockholders of the Arizona Trust Company and a restoration to their former status as stockholders of the Arizona Mutual Savings and Loan Association, show clearly the nature of their claims (p. 20). Evidently such claims depend for their recognition by a Court of Equity upon their being asserted by diligent and not by procrastinating claimants. The creditors of the Trust Company, for instance the Farmers and Merchants Bank of Phoenix mentioned at page 9 of our first brief, might well at this late date object to these claims being given effect. No court has passed upon the validity of these claims.. It is obviously, therefore, indefensible to call these former stockholders "stockholders" of the Loan Association.

While it is true that John Wagner, mentioned above, moved the vacation of the decree of February 27, 1913, it is obvious that he does so as the result of an inadvertence. He not only moves the vacation of the decree, but moves to intervene in the cause notwithstanding the fact that he is already a party to the cause and is expressly named as one of the recipients of its benefits.

His name appears at page 96 of the record, folio 288.

He makes no offer to surrender the lien of One hundred and twenty-four and 59-100 (\$124.59) Dollars which was awarded to him in the decree, or the dividend he received thereunder and, as we have said, his presence in the petition is evidently the result of an in-

advertence due to the large number of intervenors who sought to intervene in the cause.

It is obvious that those who voluntarily surrendered their status as Loan Association stockholders and became and for a period of one or more years remained stockholders in the Trust Company, by virtue of an exchange of their stock in the Loan Association for stock in the Trust Company, cannot by any possibility be still regarded as Loan Association stockholders. If they may be so regarded then the court could never enter a decree final as to such persons as might thereafter at any time see fit to come in and complain of the decree and assert rights as stockholders of the Loan Association, because originally and years prior thereto they had in reality been stockholders of record in the Loan Association.

It is admitted by the Return, as indeed it must be, that a large number of these proposed intervenors had already been parties to the record in the cause, but that by their voluntary act with full knowledge of all the facts alleged in the original bill and in the petition in intervention filed in their behalf, and which made them parties to the record, they had deliberately retired from the litigation and had refused to participate in it further, choosing as they had the right to do to remain as preferred stockholders of the Trust Company (Record pages 9-10).

Surely these litigants cannot, after the entry of a final decree in equity and after its partial execution, be accorded the extraordinary benefaction of the vacation and annulment of that decree without any attempt whatever on their part to excuse their obvious and flagrant delay in the reassertion of their rights.

Nor is the position of the other litigants who seek to intervene materially better than the class to which we have just referred. It must be remembered that the wrongful acts on which all these litigants base their claims were committed between April, 1911, and July, 1912 (Record pp. 4, 115), when the original bill was filed. These other litigants assert in their petition, verified July 15, 1913 (Record page 116):

"That your petitioners had no notice of the appointment of said receivers nor any knowledge whatsoever of said appointments; that your petitioners were unaware that said companies were in the hands of a receiver and insolvent until some time in the month of February, 1913.."

This is a positive and distinct admission on the record that all of the proposed intervenors did have actual knowledge and notice of the pendency of the proceeding in the Court below at least as early as February, 1913.

Why then, if they wished to protect their alleged rights, did they wait until the expiration of the term at which that decree was granted before seeking redress in the court below?

Why after the expiration of the term at which that decree was granted, but before the time to review it by appropriate appellate procedure had expired, did these proposed intervenors seek relief from the court below which the court was without jurisdiction to give them, instead of making application to the defendant Trust Company to prosecute an appeal from the said decree of February 27, 1913, and upon the refusal of said Trust Company to prosecute such an appeal, why did they not prosecute it themselves, if they were in reality prejudiced by it?

The elimination of the fundamental error of fact in the case, namely, that there were stockholders of the Loan Association other than those specified in the final decree of February 27, 1913, makes the decision of this case a simple one.

The only hypothesis upon which the validity of the decree may properly be discussed is that the decree does take care of every Loan Association stockholder upon an equal basis.

But the respondent does not discuss the alleged invalidity of the decree upon this hypothesis at all.

Instead the major premise of his argument is that all the stockholders of the Loan Association were not named in the decree of February 27th, 1913, although the record clearly establishes the contrary to be the fact. Consequently our argument and that of the learned re-

spondent rest upon premises at irreconcilable variance with each other, and if logically pursued must lead to different results. That equity was done all of these stockholders, whether they were represented by counsel or not, affirmatively appears from the face of the decree itself.

The fund in possession of the Court's receiver was ample to pay all of the stockholders of record of the Loan Association the amounts which they had paid in to that institution, although entirely insufficient to pay to each stockholder the amount due in accordance with the contract between him and the Loan Association, which was abrogated by the insolvency of the company.

It is true, that a condition of insolvency, as that expression is understood in its application to building and loan associations, did exist.

The Loan Association was unable to meet its obligations as they accrued (Record page 92), and it is not disputed that the assets of the Loan Association in April, 1911, amounted approximately to the sum of \$130,000 (Record pages 26-27) while it was alleged in the answer of the defendants (page 790) that in April, 1911, there was outstanding stock in the Loan Association of the attained book value aggregating approximately \$130,000. Thus it appears that the insolvency of the Loan Association at that time consisted in its abandonment of the enterprise it was organized to pursue, and

in its inability to meet and pay its obligations to its stockholders; namely, to pay as it appears from the petition approximately one thousand (\$1,000.00) dollars for every six hundred (\$600.00) dollars paid in to the company, but it did not disclose the slightest inability to pay to the stockholders approximately what each had paid in, with ordinary interest thereon. It must be remembered that the insolvency of a building and loan association is as Judge Grosscup said in *Towle vs. American etc. Society*, 61 Fed. 446-447: *sui generis*.

"The insolvency of a public building and loan association consists of its inability to perform the purposes for which it was created.

Lewis vs. Clark, 129 Fed. 570, 574.

Consequently, when the cause came on for trial, had the Loan Association or the defendant Trust Company desired that a master be appointed for the purpose of ascertaining the extent to which the intervenors and other stockholders of record in the Loan Association were entitled to receive remuneration at the hands of the defendant Trust Company as the appropriator of all of the assets of the Loan Association, such a course could have been pursued, although the result of such proceeding would necessarily have been tedious and expensive and unsatisfactory both to the intervenors, the Loan Association stockholders and to the Trust Company.

Under such circumstances, the Trust Company was confronted with an inevitable decree requiring it to surrender all of the assets derived from the Loan Association which remained in its possession unliquidated. It meant in addition thereto that property acquired by the Trust Company after its appropriation of the assets of the Loan Association would likewise be subject to delivery to the Loan Association because of the admitted inability of the Trust Company properly to segregate such assets from the assets indisputably derived from the Loan Association.

It meant the immediate suspension and complete ruination of the Trust Company in which many innocent persons had been induced to become stockholders who had never been stockholders in the Loan Association.

It was to avoid such an unnecessarily drastic decree that as appears in the first sentence of the decree (Record page 89):

“Counsel for the intervenors and counsel for the defendants were heard”

by the learned court in February, 1913, as to the final decree to be entered in that cause, and the decree which satisfied the claims of the intervenors and of each and all of the stockholders then of record of the Loan Association by giving to each a lien upon all the assets and properties of both companies for the amount that each

had paid in to these institutions, was suggested and the defendant Trust Company grasped at and accepted the benefits of that decree, which were obviously more beneficial to it and to its stockholders than a decree requiring complete restitution to the Loan Association.

There can be no doubt of the Court's power to award the liens which were decreed (Brief p. 8-9).

The defendant Trust Company not only accepted and received the benefits of this decree and, under the circumstances, was well satisfied with it, but it never prosecuted any appeal therefrom or in any way ever evidenced any dissatisfaction with the decree of February 27, 1913.

That decree, as to those named in it and as to the Trust Company, was in the nature of an enforced compromise which carried with it its benefits not only to the defendant Trust Company but to each and every one of the proposed intervenors who appear in exhibit 10 attached to the petition herein (Record page 113).

The case of *Alexander vs. Southern Home Building & Loan Association*, 110 Fed. 267, may be cited to show how freely courts enforce a compromise in winding up the affairs of insolvent Loan Association, usually so complicated. There the amount of a probable dividend was computed and allowed borrowing stockholders as a credit on their loans. Judge Pardee said at page 271:

"It is not to be understood that the allowance of this anticipatory dividend is a matter of right or

even strict equity, but rather as a compromise to aid in the speedy collection of the assets."

These proposed intervenors, as we have pointed out in the petition, themselves accepted the benefits of this decree from the day of its entry in February, 1913, until July 15, 1913, just three days after the Farmers' and Merchants' Bank of Phoenix recovered a judgment against the Trust Company of Eighteen thousand five hundred (\$18,500.00) dollars (Record page 13).

It is, of course, obvious that upon the entry of that judgment the preferred stockholders in the defendant Trust Company could no longer reasonably hope to receive any substantial part of the assets of the defendant Trust Company, which then consisted only of the surplus remaining after the payment of the liens created by the decree of February 27, 1913. They had not at that time found any means by which they, as preferred stockholders in an insolvent institution, could obtain priority in the distribution of their insolvent company's estate in preference to the claims of an ordinary judgment creditor.

After the entry of this judgment these proposed intervenors sought the annulment of the decree of February 27th, 1913, to the end that they might not only share in the distribution of the Loan Association assets as stockholders therein, after securing judicial permission to rescind their exchange of stock, but might by so doing obtain the priority to which we have referred over and

above the judgment creditor of the defendant Trust Company to the extent of eighteen thousand, five hundred (\$18,500.00) dollars.

The argument of these intervenors is in substance, that the decree of February 27, 1913, is void, unjust and inequitable, but if the court will admit us to its benefits it will thereupon be valid, just and equitable. Such an argument does not commend itself to us as sound or reasonable. It does not appear that the proposed intervenors are the only Trust Company stockholders who were once Loan Association stockholders. If they are not interventions of this character might continue indefinitely and the estate could never be settled.

Another fundamental error which permeates the discussion of this controversy on the part of our learned adversaries is that the transaction between the Loan Association and the Trust Company was void from its inception, and that its total and absolute invalidity was adjudged by the decree of February 27, 1913.

It is doubtless true that at the commencement of this cause counsel for the complainant and intervenors asserted the claim that the transaction complained of was absolutely void; but it is also true that such an assertion cannot operate as an estoppel either against the counsel who made such a claim or his clients. The court, by which the question was adjudicated, did not so decide.

Circuit Judge Morrow expressed the opinion, as we

recall it, that the transaction was only voidable. This is indicated clearly by the first order he made in the cause granting the motion for a receiver, unless within a time prescribed the defendant companies filed a bond to indemnify the then interveners against loss by reason of the transfer of assets of the Loan Association to the Trust Company.

So, District Judge Sloan was of the opinion that the transaction was in reality not void *ab initio*, but that it was merely voidable and the decree itself in paragraph fourth (Record page 93) so adjudged. It declared:

“That as to the interveners herein and other non-consenting stockholders in the defendant Loan Association, who had never transferred their stock therein for stock in the defendant Trust Company, the said proposed transfer of the assets and properties of the defendant Loan Association to the Trust Company was unlawful and invalid and not binding upon the interveners herein or upon the other outstanding and non-exchanging stockholders in the defendant Loan Association.”

This is a long way from an adjudication that the transaction in and of itself was void, even as to those who had knowledge of it and consented to it, and who for a long period of time acquiesced in it and accepted the benefits of the transaction. It has been the uniform practice of the courts in all jurisdictions in dealing with minority stockholders' suits to lean towards the holding that a transaction, however invalid, is voidable rather

than absolutely void. The consequences of holding transactions such as are disclosed in the case at bar to be absolutely void instead of merely voidable are far too serious to permit such holdings to be made. An adjudication that such transactions are absolutely void results in unsettling property rights and in defeating the equities which innocent persons frequently acquire in properties transferred from one to another not in strict accordance with the rules of law.

Such a doctrine defeats the salutary application of the defenses of laches, waiver and estoppel to facts such as are presented by the record when in common justice and good conscience as these expressions are understood in a court of equity and not in their popular or emotional sense, such defenses should be applied to situations similar to that disclosed in the case at bar. The refusal to hold such transactions to be voidable rather than wholly void would permit persons with full knowledge of the perpetration of a fraud upon them to accept the benefits of the fraud, to acquiesce in and condone the transaction by which their rights were changed and after they were no longer in a position to return the benefits they had received, would permit them to come in and repudiate the transaction upon the ground that it was wholly void and not merely voidable.

So, we accept as an undoubtedly correct exposition of the law of the case the decision of Circuit Judge Morrow and District Judge Sloan, that the transaction is in

reality only voidable as to those who in due season complained of it and took active means to correct the wrong which as to them had been done.

Moreover, in their arguments on this point our learned adversaries have overlooked an important consideration. They argue that the whole transaction was void *ab initio* and confuse references to the wrong done the Loan Association by the transfer of its assets with the wrong done them as individuals in inducing them by alleged fraud to exchange their stock of the Loan Association for Trust Company stock. No argument is needed to show that the latter transaction is the basis of the alleged rights of these proposed interveners and was merely voidable at the instance of the parties alleged to have been wronged, provided they acted diligently in seeking rescission.

While we respectfully submit that most of the discussion which follows is wholly inappropriate to the matter before the court, nevertheless, we feel it our duty to respond to the points suggested by the learned respondent in his second opinion in support of the decree of March 12, 1914, and while protesting that these suggestions raise no question whatever of jurisdiction in the court below, as constituted in March, 1914, to nullify the decree of February 27, 1913, long after the expiration of the term at which that decree was entered, nevertheless, we approach the discussion of those suggestions

for the purpose of showing that there is no merit in any of them.

(1) Reference is made by the learned respondent to the fact that shortly after the institution of the suit the complainant in the cause directed its dismissal, but that because some ten days prior to the filing of the direction to dismiss, John Dennett, Jr., and some of the other interveners named in the decree had duly filed their petition in intervention, adopting the allegations of the original bill, the court declined to dismiss the cause.

This matter was fully discussed before and passed upon by Circuit Judge Morrow and that learned judge held, in accordance with the authorities upon the subject, that since the diversity of citizenship and the requisite amount alleged indisputably existed and since it appeared that the court unquestionably had full jurisdiction of the subject matter involved, and that both defendants were before the court both by voluntary appearance and as the result of service of process upon them, the federal jurisdiction of the court was then intact. Thereafter and before the complainant's direction to dismiss was filed, the interveners filed their petition in intervention in the nature of an auxiliary bill in the court below and thereupon their rights in the subject matter were presented for adjudication, and no act of the complainant could thereafter destroy those rights.

The authorities uniformly hold that an auxiliary suit,

such as was instituted by the petition in intervention, may be maintained notwithstanding the fact that the court would not have had jurisdiction of such a suit as an original bill.

Rice vs. Dunbar Watter Co., 91 Fed. 433; Loy vs. Alston, 172 Fed. 90-94; Brown vs. Morgan, 163 Fed. 395, 396; Watson vs. Natl. Life & Trust Co., 162 Fed. 7, 10; Nat'l. Bank vs. Allen, 90 Fed. 545, 555; Huff vs. Bidwell, 151 Fed. 363, 384, and particularly the case of the Belmont Nail Co. vs. Columbia Iron & Steel Co., 46 Fed. 336, where the identical situation presented in the case at bar was passed upon, were all called to the attention of the learned court. In the latter case it appeared that an original bill had been filed in the court below and shortly thereafter a petition in intervention had also been filed by persons accepting the invitation of the representative plaintiff to join in and support the suit of the plaintiff.

Thereafter a settlement was effected between the defendant and the complainant in the cause and, as in this case, the defendant sought to defeat the existence of federal jurisdiction by virtue of that settlement. But the court refused to permit any such result to follow and it was held, as Circuit Judge Morrow held in this case, that the court's jurisdiction was still intact and that it was the duty of the court to adjudicate the rights of the litigants presented to it by the petitioners in intervention.

Consequently, there is nothing in the comment upon the complainant's direction to dismiss the litigation.

(2) It is said by the learned respondent that if the court in entering the decree of February 27, 1913, did not transcend the powers conferred upon it by law and did not exceed its jurisdiction, then the court below has no authority or jurisdiction after the term at which that decree was rendered to vacate, modify or amend that decree. On the other hand, it is said that all courts have the power to vacate at any time their own judgments rendered without or in excess of jurisdiction, and the learned court cites in support of this assertion 180 Fed. 950, and cases therein cited.

This case in 180 Fed. 950 is a familiar one.

It is the case of *Politz vs. Wabash Railroad Co.*

It is the very case which resulted in the successful application for a writ of mandamus in the Supreme Court of the United States in the matter of the Metropolitan Trust Co., 218 U. S. 321, directed to the learned Circuit Judge who rendered the opinion relied upon.

In rendering the opinion of the Supreme Court in the Metropolitan Trust Co. case, Mr. Justice Hughes announced the converse of the proposition asserted by the learned respondent in its application to the facts before the Court:

"Nor could the court," said Mr. Justice Hughes.

“exercise the general power which it possesses to modify or set aside its orders or decrees prior to the expiration of the term at which the final decree is entered: for in this case that term had ended before the motion was made.”

The decision relied upon by the learned respondent was unanimously reversed by the decision of the Supreme Court of the United States in the Metropolitan Trust Co. case, and obviously no benefit to the learned respondent can be derived from a decision which has been held by our highest tribunal to be unsound.

So, likewise, in support of the learned respondent's contention that the decree of February 27, 1913, was rendered without jurisdiction, is cited the case of the Standard Oil Co. vs. Missouri, 224 U. S. 280, Windsor vs. McVeigh, 93 U. S. 274, Reynolds vs. Stockton, 140 U. S. 265.

These authorities are supposed to support the assertion that the decree of February 27, 1913, is void because beyond the issues raised by the pleadings in that the court had no power to award a lien to a litigant who prayed for complete restitution of the property upon which the lien was awarded.

We have already pointed out that the decree was not beyond the issues raised in the pleadings.

The portions of the pleadings to which this court has directed attention show that the decree is amply supported by the pleadings.

Moreover, as we have shown, the absence of a specific prayer for the relief granted is of no consequence whatever.

The facts alleged and proved justified the relief awarded. The relief awarded was not inconsistent with the relief specifically prayed for.

Jones vs. Missouri Edison Electric Co., 144 Fed. 765, 768.

The granting of a lien on all the properties when the complainant might have had complete restitution so far as possible was clearly within the power of the court.

Erie R. R. Co. vs. Dial, 140 Fed. 689, 691.

Smith vs. Township, 150 Fed. 257, 261.

Lockhart vs. Leeds, 195 U. S. 427.

And even if this were not so, the relief granted was properly grantable upon the facts alleged and proved under the prayer for general relief.

Beiling vs. Am. Tobacco Co., 72 N. J. Eq. 32, 44.

Backus vs. Brooks, 195 Fed. 452, 454.

Walden vs. Bodly, 14 Pet. 156, 164.

Underground Electric R. R. Co. vs. Omsley, 160 Fed. 671.

See also cases cited on page 16 of petitioners' brief. It is said there is no pleading to support the decree and hence that it is void, but the Supreme Court in the case of the Standard Oil Co. vs. Missouri, 224 U. S. 280, so much relied upon by the learned respondent, expressly

took occasion to point out that the existence or non-existence of a prayer for specific relief had no effect upon the validity of a decree and this is thoroughly established by the decisions to which we have respectfully directed attention in our brief in support of our application for the order to show cause.

Indeed, the impression seems to obtain with the learned respondent that the pleading is the matter of vital consequence. We respectfully submit that it is the proof which is of vital consequence, and if the court below found proof as it did to support the decree which it rendered, it is clear that the pleadings before it were a proper and suitable conveyance for that proof which precludes the possibility that the resulting decree can be void for the reasons stated.

The evidence adduced before the court in February, 1913, is not and cannot be brought before this court in this proceeding. Can this court assume on a collateral inquiry contrary to the well settled rules of presumptions that the court below did not have evidence before it which justified its decree when that court decided otherwise after a full trial? We think this court will indulge in no such rash and unsound presumption.

It is claimed by the learned respondent that there is no allegation in the bill that restitution would be impossible or work hardship to innocent stockholders.

There are allegations in the bill which clearly indi-

cate the existence of equities in favor of persons not parties to the suit which attached to the property acquired by the Trust Company after its transactions with the Loan Association and which were not derived from any of the Loan Association properties.

Moreover, the decree expressly adjudicated the impossibility of a complete restitution at the time it was rendered and that part of the decree was expressly supported by the pleadings. (Record 33-34, 93.) Notwithstanding this positive and express adjudication by the learned court as constituted in February, 1913, which adjudication was made after a full trial upon the evidence, the learned court as constituted in March, 1914, without any evidence before it, directed that the impossible be performed and that a complete restitution of property, which had already been reduced to cash and the proceeds dissipated, should be made to the Loan Association.

We do not dispute the correctness of the decisions cited by respondent which indicate that if the court, as constituted in February, 1913, had undertaken in the supposed exercise of its equitable jurisdiction, to send some of the officers of the defendant companies to the penitentiary the decree to that extent, however just, would clearly show an excess of authority which would render that portion of the decree void.

Nor do we dispute the lack of power in a Federal

court, while engaged in the trial of an action on a promissory note, to admit wills to probate.

These are extreme illustrations which have no application to the case at bar.

In the first opinion written by the learned respondent and filed as part of the decree of March 12, 1914, it was announced (Record page 125) that to constitute jurisdiction four essentials must exist.

In the second opinion filed by the learned respondent in September, 1914, one of the alleged essentials is missing and instead Mr. Justice Brewer's language in *Reynolds vs. Stockton*, to the effect that there are only three essentials, is quoted and relied upon.

The fourth alleged essential erected by the learned respondent in his first opinion was that the Court must have proceeded according to the established modes (of procedure) governing the class to which the case belongs.

This impression was evidently obtained from a reading of the opinion in *Windsor vs. McVeigh*, 93 U. S. 274, an action in ejectment where the Court made use of this expression in its application to a confiscation proceeding in which the usual mode of procedure had been so far departed from as to strike out the appearance of a protesting defendant and to drive him from the Court below without the hearing which he actively sought in

response to the process which had been issued against him.

The Supreme Court certainly did not mean to announce that a decree rendered by a competent court of equity, with the parties and subject matter before it, would be open to collateral attack because the trial court had departed from the usual modes of procedure in not appointing a master to do the work which the court did for itself, or in some other non-jurisdictional respect.

No new fundamental requisite of jurisdiction was engrafted upon our equitable jurisprudence either by the passing comment of the Supreme Court in the ejectment suit of *Windsor vs. McVeigh* or by its erroneous application to the case at bar by the learned respondent.

We think these elementary expressions concerning the essentials of jurisdiction are well and tersely summarized by the statement of Mr. Justice Lurton in *Hine vs. Morse*, 218 U. S. 493, 505, where it is said:

"If then jurisdiction consists in the power to hear and determine as has so many times been said and the court errs in holding that a case has been made either under its inherent power or its statutory authority, can it be said that it has usurped jurisdiction and that its decrees are absolute nullities?" The court answered this inquiry in the negative.

In *Voorhees vs. Bank*, 10 Pet. 449, 474, the court says:

"The line which separates error in judgment from usurpation of power is very definite and is precisely that which denotes the cases where a judgment or decree is reversible only by appellate court, or may be declared a nullity collaterally when it is offered in evidence in an action concerning the matter adjudicated or purporting to have been so. In the one case it is a record meriting absolute verity; in the other mere waste paper; there can be no middle character assigned to judicial proceedings which are irreversible for error. Such is their effect between the parties to the suit, and such are the immunities which the law affords to a plaintiff who has obtained an erroneous judgment or execution."

This expression was quoted with approval by the court in *Hine vs. Morse*, *supra*.

Will any one assert that if the decree of February 27, 1913, had been offered in evidence in some controversy wholly unrelated to the cause in which it had been rendered, that any court could properly have regarded it as mere waste paper or as a nullity? Obviously not. Even the contention of the respondent is not quite so sweeping in effect.

The Supreme Court says there is no middle course. It is either nothing or it is what it purports to be and as such entitled to absolute verity.

Clearly the court had power to hear and determine the controversy before it in February, 1913. In the last analysis, the contention of the learned respondent is simply that a different and more drastic decree should

have been rendered. In other words, the respondent would have decided differently had the case been before him for decision in February, 1913. This we concede. But the power to hear the cause and determine it is not disputable. Suppose the Court did err in some respect, whence did the respondent derive the authority which he assumed to exercise to sit in review upon the acts of his learned predecessor, and to revise those acts for ordinary alleged error while the decree stood irreversible for that cause either by the respondent or even in this learned court because of the lapse of time?

How can it be disputed that the court had before it in February, 1913, a justiciable controversy which it was its duty and within its power to decide?

How can it be denied that this power to hear and determine included the right to decide upon and to find the facts which limit the extent of the court's authority and that such decision is the subject of review only in an appellate court and not the subject of revision after the term by another judge holding the same court.

We are, of course, well aware that no court can confer jurisdiction upon itself by deciding that it has jurisdiction when by law it has not. But having admitted jurisdiction to grant a complete restitution of property, if such relief had been physically attainable, does the court lose jurisdiction to grant less than a complete restitution because it cannot grant all the relief prayed for?

The court had jurisdiction to find the facts. It found facts which in its judgment justified the relief granted. Those facts were within and supported by the pleadings. Is it of the slightest legal consequence that the learned respondent entertains a different opinion as to the relief which his learned predecessor should have granted?

We confidently approach the discussion of the authorities cited by the learned respondent in support of his contention.

An inspection of these authorities will disclose their utter inapplicability to the case at bar.

In the case of the Standard Oil Co. vs. Missouri, 224 U. S. 280, the court had before it on a writ of error directed to the Supreme Court of Missouri a judgment of ouster and fine which had been rendered in original quo warranto proceedings in the Supreme Court of Missouri.

The decision involved an inquiry into the power of the Supreme Court of Missouri to impose a fine in quo warranto proceedings, although those proceedings had been instituted solely for the purpose of ouster and had not prayed the imposition of any fine upon the respondent.

The Supreme Court of the United States affirmed the judgment and while it is true in the course of the opinion it gave expression to the views quoted by the

learned respondent, yet it is clear from a reading of the opinion that the statements there made are entirely inapplicable to the case at bar, while many other expressions contained therein indicate the clear and absolute finality of the decree of February 27, 1913, and its immunity from assault by the learned court below.

So, in *Windsor vs. McVeigh*, 93 U. S. 274, it appeared that the plaintiff in the court below had brought ejectment to recover certain land in the city of Alexandria, in the state of Virginia. The plaintiff proved title in himself and the defendant relied upon a deed to his grantor from the United States Marshal in proceedings which had been had for the confiscation of the plaintiff's property.

It appeared that in the year 1863 the premises were seized by the Marshal of the district and a libel of information against the property filed in the name of the United States upon the ground that the plaintiff was the owner of the property, but that due to his affiliation with the Confederate Government and his participation in the rebellion that his property was rendered liable to seizure and confiscation at the instance of the United States. The owner appeared in response to the process which issued against him but his appearance was stricken out by the court below and he was denied a hearing and under the resulting decree a sale of the property was had which the defendant in the ejectment suit asserted as his muniment of title. To review

a judgment in favor of the plaintiff a writ of error was issued from the Supreme Court of the United States and thereupon the judgment was affirmed.

The question considered was whether the decree in condemnation was of any validity, it appearing that the defendant therein had appeared and had sought a hearing, but that his appearance was stricken from the files and he was affirmatively denied the right to a hearing in the court below.

Can it be said that such a case has the remotest application to the case at bar?

As we have already pointed out in this case, all parties were before the court and were in reality heard in the rendition of the decree of February 27, 1913.

All of the stockholders of the Loan Association were represented before the Court pursuant to the authority conferred by rule 37 of the Supreme Court Rules and by the authorities which authorize those having a community of interest in litigation of this character not only to represent such non-appearing persons who are already quasi parties to the record, but to bind such non-appearing parties by the resultant decree. It is a certainty that both the Loan Association and the defendant Trust Company were before the court at the trial of this case. It is equally certain that the rights of every one of the proposed interveners who were by their own admission stockholders in the Trust Company, were fully

represented by that Trust Company in the court below, and the decree shows that in reality the decree was more beneficial to the defendant Trust Company, and consequently to those who were still its stockholders, than any decree which either the defendant Trust Company, its stockholders or its judgment creditors had a right to exact.

An examination of the case of Reynolds vs. Stockton, 140 U. S. 254, shows that it contains nothing adverse to the petitioners. In that case the plaintiffs had sued a certain absent defendant and the Superintendent of Insurance of New York to recover a portion of a fund of one hundred thousand (\$100,000) dollars in possession of the Superintendent of Insurance. The proceeding resulted in a judgment or decree against the defendants other than the Superintendent of Insurance, at least one of whom was not served with process, who never actually appeared in the proceeding and took no part whatever in the trial, which judgment was for more than one million (\$1,000,000) dollars. We do not think the quotations made from that case by our learned opponents are fair. We think they only tend to mislead until the case is examined. The omission from the quotations made by our learned opponents of the portions of the opinion which expressly refer to a different rule, either where substantial amendments are made to the complaint or where it appears that the defendant actually took part in the litigation of the matters determined, is most significant.

At page 266 the Court in this case said:

“Nor are we concerned with the question as to the rule which obtains in a case in which, while the matter determined was not, in fact, put in issue by the pleadings, it is apparent from the record that the defeated party was present at the trial and actually litigated that matter. In such a case the proposition so often affirmed, that that is to be considered as done which ought to have been done, may have weight, and the amendment which ought to have been made to conform the pleadings to the evidence may be treated as having been made. Here there was no appearance after the filing of the answer and no participation in the trial or other proceedings. Whatever may be the rule where substantial amendments to the complaint are permitted and made, and the defendant responds thereto, or where it appears that he takes actual part in the litigation of the matters determined, the rule is universal that where he appears and responds only to the complaint as filed, and no amendment is made thereto, the judgment is conclusive only so far as it determines matters which by the pleadings are put in issue.”

We think the distinction between the case cited and the case at bar is self-evident. In the case at bar there was no failure to secure the personal attendance of both defendants. Both were actually present at the trial contesting all of the issues presented and litigated, and each defendant had its remedy in the event that the court rendered a decree beyond the pleadings in the cause to seek redress by appropriate appellate procedure. It is, of course, obvious that the proposed interveners

named in Exhibit 10 could not properly have been made parties to the cause at the instance of the complainant. A bill joining such persons as parties would have been clearly bad for an improper joinder of parties because at least until such persons evidenced their claim to a recision of their status as Trust Company stockholders their rights were purely derivative from the Trust Company, and consequently fully protected by that Company's resistance of the decree.

Let these persons now complain that they had no "hearing" and were not before the court.

It is plain that they were before the court and did have a full hearing which effectually demonstrates the inapplicability of the cases relied upon by the respondent.

An inspection of the authorities cited and relied upon by the learned respondent and his counsel shows that much of the language quoted from the opinions of the courts, which tends to indicate that the scope and exercise of a court's authority is always open for review, were in reality announced by courts exercising appellate jurisdiction over the decrees complained of and the cases are inapplicable to the cases at bar.

(3) It is useless to discuss at length the character of the controversy presented by the suit in the court below.

It was a minority stockholder's suit instituted by the complainant in a representative capacity to redress

wrongs which had been sustained by the corporation in which he was a stockholder. It is equally plain that the avails of such litigation belonged to the company in the interest of which such litigation was brought and maintained. But may we inquire to whom the avails of this litigation should have been delivered? Should they have been delivered to the delinquent officers of the insolvent Loan Association who were charged with a misappropriation of its assets and with breaches of trust which rendered them wholly unfit to continue to occupy their positions as fiduciaries for the complainant and the other stockholders? Does the learned respondent forget that one of the purposes of the bill was to wind up and dissolve in effect the business of the defendant Loan Association? Is it forgotten that a temporary receiver of the defendant Loan Association had been duly appointed and that the final decree of February 27, 1913, appointed a permanent receiver for the purpose of receiving the assets and funds belonging to the defendant Loan Association? The avails of the litigation were delivered into the possession of the receiver of the Loan Association to be distributed by him to those whom the court adjudged and determined were lawfully entitled to them.

Obviously, the receiver received them in the right of the corporation of which he was appointed receiver. Obviously, he had but one duty to perform with reference to their disposition. It was his duty to obey the mandate contained in the decree of the court, not his duty to speculate whether the court had rendered justice

or injustice, not to determine for himself whether some other decree would not have been preferable.

(4) It is true that the rights of the interveners and stockholders of the Loan Association named in the decree of February 27, 1913, included the right to participate in a distribution of all the assets of the defendant Loan Association upon the distribution of those assets to it upon a complete winding up of its affairs. It is equally true that a court of equity, having before it both of the companies involved in this transaction, as well as each and all of the stockholders in the defendant Loan Association, was not so bound and circumscribed by form and rule not supported by reason, that it could not reach an equitable adjustment of the varied and complicated equities presented to the learned court, not alone by the pleadings but by the proof adduced before it.

All of the stockholders of the Loan Association were willing to forego their pound of flesh by trying to enforce payment of their exact distributive share in the assets of their insolvent company. They were content to accept a lien upon the assets of their company for the amount which they had paid in to that sinking concern. They were willing to waive any interest upon their payments which constituted years of saving; they were willing to waive the fulfillment of the glittering promises contained in their contract with the Loan Association, and in consideration of such waiver receive what they had actually paid in to the unsuccessful enterprise.

The Loan Association was a mere legal shell composed only of the interveners and its stockholders named in the decree of February 27, 1913. All of its other former members had abandoned the enterprise and had cast their lot with the defendant Trust Company. The Loan Association had no creditors and no one existed who either could or did object to the terms of the decree of February 27, 1913.

Is it not significant that no stockholder has attempted to intervene, asserting himself to have been a stockholder of the Loan Association when the decree of February 27, 1913, was entered and that he did not receive the benefits of that decree? Instead, every stockholder of the Loan Association has accepted the benefits of the decree and no such person complains of it.

The defendant Trust Company was greatly benefited by the decree of February 27, 1913. It made no complaint of the decree and, as we have stated, the only complainants are the ordinary preferred stockholders of the defendant Trust Company who seek to avoid the consequences of their company's debt of eighteen thousand, five hundred (\$18,500) dollars by an attempt to reinstate themselves as stockholders in the defunct Loan Association long after the rights of all such stockholders have been finally heard and determined.

(5) The learned respondent propounds the following inquiry in his second opinion :

"It is alleged that at the time of the said transfer the Trust Company was insolvent and paid nothing of value for the assets of the Loan Association, and that the whole transaction was a fraudulent scheme: then why vest the title in the Trust Company?"

The reason for vesting the title in the Trust Company is obvious. The court had adjudged the interveners and all the stockholders of the Loan Association to be entitled to a lien upon the assets of the Company and the surplus was to be delivered to the Trust Company. The theory was that the rights of the Loan Association stockholders having thus been amply protected, no one else remained who did or could complain of the transaction between the Loan Association and the Trust Company.

In other words, while as to the complaining interveners and the stockholders of the Loan Association the transaction was invalid, yet as to other persons the transaction was not illegal and when the interveners and the Loan Association stockholders were given a lien upon the property their safety and protection required that the validity of the title to the property to which their lien attached should likewise be adjudicated to the end that their lien might have unquestioned and indisputable validity.

The impossibility of complete restitution for which the complainant and interveners originally prayed, was another reason why the alternative relief was accorded to

the interveners and stockholders of the Loan Association and why this relief was just and equitable. Further, because this method of disposing of the equities presented did justice to the interveners and stockholders of the Loan Association and did not with unnecessary severity destroy the then going concern conducted by the defendant Trust Company. Nor did it destroy needlessly the rights of its innocent stockholders who had never had any connection with the defendant Loan Association. And finally, because the remedy accorded the interveners and the stockholders by the award of a lien upon the properties, as to which these same persons prayed a complete restitution, was in reality not at all inconsistent with the specific prayer contained in the original bill.

As we have indicated the decree was not dissimilar to a decree nisi, or to one which bears internal evidence of an enforced compromise between the parties to the litigation. As Circuit Judge Sanborn said in *Jones vs. Mo. Edison Electric Co.*, 144 Fed. 765, 778:

"Nor is the suggestion, that the complainant may not recover the value of his stock in this suit in equity because such a recovery would be inconsistent with his repudiation of the contract of consolidation, and because he has not prayed for it, very material. The first prayer of the bill is for the restoration of its property to the Edison Company and this is in effect for a restoration to the complainant of his share of it. Now as the court may under this prayer rehabilitate the Edison Company, it may do less. It may

grant a decree nisi, a decree that all its properties, powers and franchises be restored to the Edison Company, unless within a certain time the defendant pay to the complainant and those who join him the value of their share of the property transferred to the consolidated company. Such a decree would be consistent with the repudiation of the contract of consolidation and with the first prayer in the bill."

The learned respondent concludes his inquiry as follows :

"The effect of this transfer was to subject all the assets of the Loan Association, remaining after the payment of the interveners' preferred lien, to the obligation of the insolvent Trust Company, thus leaving the shares of stock of the remaining stockholders valueless."

Of course, the assets of the defendant Trust Company ordinarily would be and should be subject to the obligations due from the Trust Company to its lawful creditors in preference to the claims of ordinary preferred stockholders in the Trust Company. We cannot find anything extraordinary in this aspect of the decree. In fact, we respectfully suggest that one of the most extraordinary features of the decree of March 12, 1914, is that it in effect subordinates the claims of the lawful creditors of the Trust Company to those of its preferred stockholders.

(6) Again the learned respondent says :

"If it be admitted that in this class of cases the avails of the litigation belong to the corporation de-

frauded and not to the complaining stockholders, then it seems to me that the learned judge *erred* in entering the decree of February 27, 1913."

The argument is then made that the record shows that those named in the decree of February 27, 1913, are not the only stockholders of the Loan Association, which statement has already been completely refuted, and the learned respondent concludes that there is no law which authorizes the court to charge the entire property of the Loan Association with a lien and trust in favor of a part only of such stockholders, and leave the losses and expenses of litigation to be borne by the remaining stockholders.

A sufficient answer to this assertion is that nothing of the sort was done.

(7) It is asserted that the decree is conflicting in its provisions, particularly in adjudging a fee of over three thousand (\$3,000) dollars to the attorney for the interveners, in that it is said the court must have found that he rendered services which entitled him to a claim against the corporation itself, and was a proper charge against the avails of the litigation which he had conducted, for it is said the decree directs that this fee shall be paid out of the funds belonging to the corporation in the hands of the receiver.

"If," continues the respondent, "the services were not rendered for the corporation and if the avails of the litigation which he conducted did not inure

to its benefit, then the court was not authorized to pay him out of the funds which belonged to the corporation. Such compensation should have come from the interveners or from funds which belonged to them alone. One provision of the decree limits the liens granted by it to the interveners named therein, while another provision gives the attorney for the same interveners a substantial fee out of funds to which they had no interest and which did not diminish the amounts to be received by them."

We are at a loss to understand why this argument is made. Surely, the learned respondent cannot successfully maintain that if an error were committed by the court as constituted in February, 1913, with reference to the award of an allowance to counsel, that such an award would render the decree of February 27th subject to annulment.

The award of this allowance has never been made the subject of review before any court. Indeed, it was based upon an express finding of fact made by the court which granted it (Record 97), that it appeared to the court's satisfaction that

"Counsel for the interveners herein has rendered substantial services of value to all of the interveners and to all of the stockholders of the defendant Loan Association named in the preceding paragraph, and that said services have resulted in the production of a fund in court consisting of the assets of the said defendant Loan Association and of the assets of the said defendant Trust Company for the benefit of the said interveners named herein, and for the benefit of

the stockholders of the defendant Loan Association named in the preceding paragraph, and the cause being one of extraordinary and exceptional difficulty, and the court being fully advised by proof of the value of the services rendered"

in accordance with the usual practice of the court in such cases the court made allowances not only to counsel for the interveners but also to the receiver of the Loan Association and to his counsel.

The award to counsel for the interveners was in the following language:

"To the interveners above named upon account of the services rendered to them in this proceeding by their counsel, William M. Seabury, \$3,376.06."

Before continuing this argument we desire to point out the misstatement of fact which inadvertently appears in the comment of the learned respondent in which he says:

"One provision of the decree limits the liens granted by it to the interveners named therein. * *"

A mere inspection of the decree (Record page 95) shows that it is not so limited, but includes all of the stockholders of the Loan Association.

The allowance which was made to the interveners' counsel was made by the court not only after the presentation of proof, but after a careful review of the authorities applicable to the situation. The proof amply

justified the award inasmuch as it appears of record in this case that solely as the result of the services rendered by counsel for the interveners a fund had been produced in court of the approximate value of seventy-thousand (\$70,000) dollars (Record pages 17, 97-98) and that this fund had been wrested from the hands of the corrupt officers of the defendant companies who were engaged in its depletion.

The decisions which were called to the attention of the court as constituted in February, 1913, and were subsequently called to the attention of the learned respondent, were ample authority for the making of the allowance. The authorities to which we refer are the following:

Lamar vs. Hall & Wimberly, 129 Fed. 79, 82.

Barber vs. Southern Building & Loan Association, 181 Fed. 638.

Ely vs. Van Kamel Revolving Door Co., 184 Fed. 459.

Burroughs vs. Toxaway Co., 185 Fed. 435, 441.

Miers vs. Columbia, etc., Association, 166 Fed. 781.

Guaranty Trust Co. vs. Chicago R. R., 185 Fed. 441.

Trustees vs. Greenough, 168 U. S. 505, 527.

Central Railway vs. Pettus, 113 U. S. 116.

It is certainly clear that this allowance is not prop-

erly the subject of revision in this learned court in this proceeding. The decree of March 12, 1914, contained no allusion to the subject of counsel fees, nor is it possible to tell from an inspection of the decree of March 12, 1914, whether the portion of the decree of February 27, 1913, which awarded counsel fees was intended to be revised and corrected by the learned respondent, and if so, to what extent. If the real purpose of the annulment of the decree is the recovery of this counsel fee why not say so?

We are wholly unable to understand or appreciate the argument of the learned respondent upon this subject. The theory upon which compensation is awarded to attorneys for complainants in litigation of this character is well known and clearly understood by this court. The cases which we have cited clearly disclose that such allowances are made upon the theory of compensation or partial compensation to those who employ the attorney whose services result in the production of a fund beneficial to those persons and to the persons chargeable with the obligation to pay for the services which have resulted in benefit to them. The award is made in the nature of costs for the successful conduct of litigation of the kind specified. It is absurd to suggest that the lien of the interveners and of the stockholders of the Loan Association who receive the ultimate benefit of the services rendered should be diminished to the extent of the allowance made, when it appears in this case that

the fund produced was amply sufficient to discharge the liens created by the decree in full, as well as to pay the ordinary legitimate costs and expenses of administration.

The rights of the interveners and of the Loan Association stockholders were and are contingently charged with the cost of administration. The decree expressly provides (Record page 99) that the receiver shall sell the whole or such part of the assets

“as may be necessary, first to pay and discharge the allowances heretofore made as the cost of administration of the insolvent estate of the defendant Loan Association, and thereafter to discharge and pay the costs and expenses incident to the administration of the estate of the said defendant Trust Company * * * * and that thereafter he pay pro rata in equal shares to each and all of the interveners herein and to the stockholders of the defendant Loan Association named in the preceding 8th paragraph such sums of money as may be received by such permanent receiver until the said interveners and the said non-exchanging Loan Association stockholders named in the preceding 8th paragraph are paid in full the amounts set opposite their respective names herein.”

Consequently, if the estate under the management of the receiver should so diminish as not to be sufficient to pay in full the liens created by the decree of February 27, 1913, in that event all of the interveners and all of the stockholders of the Loan Association who derived the benefit of the services of the complainant's counsel would have their liens diminished to the extent of all

the costs of administering the estate of the insolvent Loan Association. If, on the other hand, the estate was sufficient to pay the claims of the interveners in full, as well as the claims of the Loan Association stockholders, it was in accordance with the usual course of procedure in such cases to direct that the unsuccessful party who was entitled to the surplus remaining after the payment of the claims involved in the litigation should, of course, pay the legitimate costs and expenses of administration.

It may be sought to elicit from this learned court some expression of opinion adverse to the allowance which the court made to counsel, although we respectfully submit that the record before this court conclusively demonstrates that such allowance was reasonable for the amount and value of the services rendered, and that it was a proper exercise of discretion by the learned court below as constituted in February, 1913, amply supported by the authorities and in strict accord with the usual mode and practice of procedure in such cases.

(8) It is argued that because it appears in the decree of February 27, 1913, that the persons therein named were deceived and induced to effect an exchange of their Loan Association stock for stock in the Trust Company by misrepresentations made to them by the defendants, some of which misrepresentations were contained in printed literature of the companies, it must necessarily follow that all other persons who exchanged

their stock in the Loan Association for stock in the Trust Company were similarly deceived. This argument is plainly without merit.

Of course, such a result does not necessarily, or even probably follow, and if it did, it would amount to nothing. This record is replete with conclusive evidences against the proposed interveners, that even if they were deceived they acquiesced in the fraud perpetrated on them after full knowledge of its perpetration, and in many instances took affirmative steps to procure the ratification of the transactions had between these two companies by withdrawing from the litigation below in which they originally embarked and by accepting the benefits of the decree of February 27, 1913, as preferred stockholders in the defendant Trust Company until long after the expiration of the term at which the decree in question was entered.

It occurs to us that a perfect case of laches, waiver and estoppel is made against those at whose instance the learned respondent undertook to nullify the decree of February 27, 1913, and it becomes wholly immaterial to inquire whether these persons were or were not deceived by representations similar or dissimilar to those upon which the interveners named in the decree of February 27th, 1913, relied to their detriment, and of which these latter persons took occasion to complain and have rescinded by a court of competent jurisdiction before it was too late so to do.

(9) Counsel for respondent say in substance that a distribution of the assets collected cannot be made on any other basis than that the original complainant and interveners should prorate in the assets so collected, that to permit any stockholder suing in a representative capacity "to be paid in full the book value of his stock as has been done in the decree of February 27, 1913, would be to disregard the fact that they were stockholders in the insolvent Loan Association and take from the pocket of those for whose benefit this stockholders' suit was instituted a sum of money sufficient to pay in full those stockholders who were his representatives in the bringing of the suit."

This assertion involves several misconceptions. The decree expressly provides that in the event the funds are insufficient to pay the Loan Association stockholders the full amount of their liens the receiver shall prorate the payments accordingly (Record 99, folio 297). But no Loan Association stockholder was paid in full the book value of his stock as inadvertently stated by counsel. The book value means the value of the stock as determined by the books under and pursuant to the terms of the contract; in this case approximately one thousand (\$1,000) dollars for every six hundred (\$600) dollars paid in.

The decree in this case directed the return to the stockholders of the amounts actually paid in without in-

terest, which sums were to be prorated if the funds were insufficient to pay the amounts specified.

We are unable to see anything inequitable or unconscionable in such decree.

It was an equal method of distribution and a just one.

It did not differentiate between matured and unmatured stock.

There is ample authority to the effect that upon the insolvency of a Building and Loan Association those whose stock had matured are not entitled to a preference and priority over and above those whose stock had not matured.

Towle vs. American Bldg. & L. A., 75 Fed. 938.

Coltrane vs. Baltimore Bldg. & L. A., 110 Fed. 281, *aff'd* 113 Fed. 785.

Alexander vs. Southern Home Bldg. & L. A., 110 Fed. 267.

Solomons vs. American Bldg. & L. A., 116 Fed. 676, *aff'd* 120 Fed. 1018.

The authorities indicate that upon the insolvency of a Building and Loan Association the contract between the association and its members is abrogated and that nothing remains but the distribution of the assets of the association in accordance with equity and good conscience.

If the insolvency of the association abrogates the

contract, as it clearly does, what more just or equitable distribution could be made than to require the Loan Association to restore its stockholders as nearly as possible to their original status? And is not this done by a decree which directs that the moneys actually paid in to the insolvent institution shall be returned to those who paid it, in this instance even without interest, leaving the Trust Company as the successor in interest of the Loan Association to deal with others who had acquired substantial interests in its properties as justice might require?

(10) Nor is there the slightest occasion for the alarm and anxiety expressed by our learned opponents that because no master was appointed, it is impossible to determine which, if any, of the persons named in the decree, were borrowers of the Loan Association. The creation of a lien in favor of the persons named did not discharge any pre-existing debt due from the lienors to the company.

We assume that the receiver would perform his duty in this respect and either collect or offset the debt of the lienor against the lien before the lien is paid in accordance with the terms of the decree of February 27, 1913.

(11) We deem it unnecessary to discuss at length the assertion that the decree is void because it is one at law or because the bill is now said to be multifarious.

A decree in equity does not become a judgment at

law because the decree contains a provision for the payment of money and we are not aware that even if a bill is multifarious that the question of its multifariousness may be presented after it was raised and adversely disposed of on demurrer and after the entry of a final decree on the merits, or if it could be so raised that by any possibility the question could be regarded as one of jurisdiction.

We have endeavored to respond to every point suggested by our opponents and believe we have done so.

While the learned respondent and his able counsel felicitate themselves upon their desire to approach and consider the merits of the controversy without argument upon technicalities, this is ingenuous but harmless sophistry, since the decree has been subjected to the same searching scrutiny which it would be accorded were it here for review upon appeal and its revision is sought upon every technicality which the ingenuity of our learned opponents could suggest, even including the claim that the court is without jurisdiction because the original bill is said to be multifarious.

It renders no assistance to this court to have the learned respondent say in substance that this proceeding is clearly not within the court's jurisdiction, but nevertheless the respondent submits to the court and requests that it decide the matters alleged to be improperly before it.

We have not known this learned court to engage in academic discussions beyond the scope of its jurisdiction even at the request of a District Court for enlightenment upon matters which it is the duty of that court to determine for itself.

“* * * * the judicial power of the United States must not be exerted in a case to which it does not extend even if both parties desire to have it exerted.”

Dred Scott case, 19 Howard 393, 567.

And this is clearly applicable to the exertion of a general as distinguished from an exclusive federal jurisdiction.

But we respectfully submit that the questions relating to the jurisdiction of this court to grant the relief prayed for are entirely clarified and the right made manifest by the views expressed by it upon the rendition of the order to show cause, and having determined the existence of jurisdiction to grant the alternative writ upon the showing made, that writ should be made absolute, since the return discloses no grounds for the denial of the remedy now so clearly shown to be within the jurisdiction of this Court and a matter of such vital necessity to the petitioners.

This learned court refrained from expressing any opinion as to whether the decree of February 27, 1913, was final and whether it was still in the breast of the

court in March, 1914, when it was nullified by the respondent.

Upon the first subject we respectfully contend that as to all parties the decree of February 27, 1913, possessed every attribute of finality and that it is a final decree in every sense of the word.

Simpkins, *A Federal Equity Suit*, 2d Edition, p. 607, and cases there cited.

Upon the other question, whether the decree of February, 1913, was still within the breast of the court in March, 1914, we say that this is a mixed question of fact and law.

The return avers no fact which shows that there was any reservation of any kind which prevented the expiration of the term from operating to terminate the power of the court over the decree of February, 1913. Indeed, it clearly appears from the record that nothing was reserved by the court which could lawfully have resulted in leaving the decree of February, 1913, in the breast of the court after the expiration of the term at which it was granted.

It follows as a matter of law that the expiration of the term placed that decree beyond the power of the court, and that the instrument of March 12, 1914, by which the learned respondent assumed to nullify it, is a mere nullity.

We conclude that the decree of February 27, 1913, was not and is not void.

Consequently, the decree of March 12, 1914, which assumed to nullify it, is itself a nullity and the remedy invoked in this case being appropriate and necessary to redress the extraordinary situation disclosed by this record, we respectfully submit that the relief prayed for should be granted.

Respectfully submitted,

WILLIAM M. SEABURY,
Solicitor for Petitioners,
Fleming Building,
Phoenix, Arizona.

San Francisco, October
13th, 1914.

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NO. 2417

IN THE
United States
Circuit Court of Appeals
For the Ninth Circuit

In the Matter of the Application of
JOHN DENNETT, JR., for Writ of
Mandamus Directed to the HON.
WILLIAM H. SAWTELLE, Judge
of the United States District Court
for the District of Arizona, and Di-
rected to said DISTRICT COURT.

Motion and Petition for Rehearing
and for Stay of Mandate

WILLIAM M. SEABURY,
Solicitor for Petitioners,
Fleming Building,
Phoenix, Arizona.

MAY 11 1915

F. D. MONTGOMERY

*In the United States Circuit Court of Appeals for the
Ninth Circuit.*

In the Matter of the Application of
JOHN DENNETT, JR., for Writ of
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WILLIAM H. SAWTELLE, Judge
of the United States District Court
for the District of Arizona, and Di-
rected to said DISTRICT COURT.

MOTION AND PETITION FOR REHEARING.

And now within the time prescribed by law comes the petitioner above named and moves this Honorable Court to grant a rehearing and for the alternative relief specified in the petition hereto annexed upon the grounds thereon set forth and for such other relief in the premises as may be proper.

Dated March 8, 1915.

WILLIAM M. SEABURY,
Solcitor for Petitioners,
Fleming Building, Phoenix, Arizona.

*In the United States Circuit Court of Appeals for the
Ninth Circuit.*

In the Matter of the Application of
JOHN DENNETT, JR., for Writ of
Mandamus Directed to the HON.
WILLIAM H. SAWTELLE, Judge
of the United States District Court
for the District of Arizona, and Di-
rected to said DISTRICT COURT.

PETITION FOR REHEARING

TO THE UNITED STATES CIRCUIT COURT OF
APPEALS FOR THE NINTH CIRCUIT AND
THE HONORABLE JUDGES THEREOF.

The petition of John Dennett Jr., and others named
herein as petitioners, respectfully shows to this Honor-
able Court and alleges:

Heretofore and on or about February 15, 1915 this
learned Court rendered a judgment or decree dismissing
the application of your petitioners for a writ of man-
damus as heretofore prayed for herein.

And your petitioners respectfully allege that this
learned Court erred in dismissing said petition and in
denying relief to your petitioners as prayed for in each

and all of the following respects :

(1) The opinion rendered by the learned Court in this case on February 15, 1915 indicates that the denial of your petitioners' application for mandamus is based solely on the decision that the decree of February 27, 1913 is not supported by the pleadings and exceeds the scope and purpose for which the suit was brought, in that the decree fails to foreclose the possible rights of Trust Company stockholders to rescind their exchange of Loan Association stock for Trust Company stock, in consequence of which this learned Court concludes that the decree of February 27, 1913 is void and that it was, therefore, lawfully vacated after the term at which it was entered by the decree of March 12, 1914.

But the decree was not unsupported by the pleadings nor was it beyond the scope of the purpose of the suit and if it had been the decree would not be void but merely erroneous.

It is not disputed that the complainant Clark brought his bill to redress a wrong sustained by his corporation, namely; the deprivation of its property from the Trust Company.

It is not disputed that all stockholders of the Loan Association were similarly situated with respect to the redress of that wrong and that the fruits of the recovery resulting from a restoration of Loan Association assets

was the common property of Loan Association stockholders.

The remedy exercised in the suit so far as restoration of Loan Association assets is concerned was collective in that it necessarily benefited all of the same class, of which the complainant and other non-exchanging stockholders who intervened were representative members.

The purpose of the suit was to distribute to its stockholders Loan Association assets when recovered and this was done, each stockholder voluntarily accepting the amount each had paid into the company in lieu of a distributive share in the assets.

The decree was not dissimilar to the decree approved by the Eighth Circuit Court of Appeals in *Jones vs. Mo. Edison Electric Co.*, 144 Fed. 765, cited with approval by this Court, and again in 199 Fed. 64, and by the Sixth Circuit Court of Appeals in *Stebbins vs. Michigan Wheelbarrow & Truck Co.*, 212 Fed. 19.

The Loan Association had no creditors (R. 28, fol. 86) and all of its non-exchanging stockholders, acquiesced in and accepted the method of distribution adopted by the decree of February 27 and no such stockholder has ever complained of it.

The original bill pleaded no cause of action based on descission of individual stock subscriptions.

It is obvious that none of the exchanging stockholders named in the decree of February 27 relied upon the original bill to support this branch of their case, for they specifically pleaded in their intervening petitions the facts on which they based their right to rescind.

All of these intervenors appeared prior to the first decree claiming that they had once enjoyed a status as Loan Association stockholders but had been induced through the fraud of the companies to surrender this status and become Trust Company stockholders.

These persons sought individually and not collectively to exercise the remedy of rescission for their own individual benefit. They represented themselves as individuals and no one else, and did not assume to represent any one else until by judicial decree they regained their original status and then with the complainant they represented Loan Association stockholders and not Trust Company stockholders.

These individuals exercised their remedy diligently, before the insolvency of the Trust Company was established and before the rights of its creditors had accrued.

The wrong against which these intervenors sought primary relief *was not a wrong done to either corporation.*

It was a wrong done by both corporations to them as several individuals.

Their right to a status as Loan Association stockholders and their consequent and wholly dependent right to join with the complainant in behalf of the Loan Association stockholders in the recovery of Loan Association assets, rested solely upon proof of the fraud practiced upon them as individuals when they gave up their Loan Association stock and became Trust Company stockholders.

Such rights are not the subject of "foreclosure" in the sense in which this expression is used in connection with this case.

A consideration of the characteristic features of the remedy of rescission demonstrates this to be so.

The rights claimed depend for their existence entirely upon their prompt assertion and their diligent prosecution. There is no duty upon those who assert rights *against* and not in favor of a corporation to seek out the stockholders of a sinking concern to compel them to take notice of their corporation's distress.

Such a doctrine is contrary to a sound public policy and violative of well settled principles of equity.

Instead of any such rights existing, the rigorous duty is imposed upon those who seek to avail themselves of the exercise of the remedy of rescission to assert the right with the utmost promptness, to prosecute it vigorously and not to exercise it at the expense of creditors and others who, by their diligence, have acquired a legal

right or a superior equity which will be impaired by the exercise of that remedy.

Thus, even if all the Trust Company stockholders were similarly deceived with respect to their individual stock subscriptions, the wrong gave rise to an individual and not to a collective remedy.

It was not the purpose of the suit to marshall the assets of the Trust Company or to distribute them to its stockholders.

It follows that the decree was not unsupported by the pleadings nor beyond the scope of the purpose of the suit, but if it were, we respectfully submit the decree would not be void but merely erroneous.

This is not a case in which an indispensable or even a proper party was absent from litigation or not before the Court.

In an action by a minority stockholder of the Loan Association to compel a restoration of that company's property from the Trust Company, the only indispensable parties defendant are the two corporations.

All the Loan Association stockholders were before the Court. The Trust Company stockholders could have no right to individual notice until the distribution of the assets of the Trust Company was begun. The decree of February 27, 1913 did not contemplate or undertake the distribution of Trust Company property as such.

Its object was merely to satisfy the liens created by what decree out of the properties of both companies and to return the surplus remaining to the Trust Company as a going concern.

It is said that the rights of exchanging stockholders were the same as the non-exchanging stockholders; that they were in the same class and as such entitled to notice or to have their right of participation in the Loan Association assets foreclosed. In other words, that the Trust Company stockholders had an interest in common with the Loan Association stockholders who had never exchanged, in consequence of which they had a right to assume that the suit would result in benefit to them whether they intervened therein or not.

But the premise upon which these assumptions rest is erroneous.

The interests of Trust Company stockholders prior to rescission were not in common with those who had not exchanged. They were adverse. If they had been in common, it would have been wholly unnecessary for the exchanging stockholders to seek and obtain the right to rescind their status and to be restored to the status of Loan Association stockholders if they already enjoyed that status.

So likewise such rights were adverse to the Trust Company and its stockholders who did not seek rescission.

When the exchanging intervenors named in the first decree asserted the right of rescission against the Trust Company based on the fraud of that Company, they asserted rights adverse to every stockholder of the Trust Company who had not sought rescission and adverse to the Trust Company itself, because the right to rescind meant the depletion of the Trust Company's assets to the extent of the share of those permitted to change their status from Trust Company to Loan Association stockholders.

But the interest of the Trust Company *was identical with that of its stockholders who did not seek rescission* and no one disputes that the Trust Company resisted the claims of the intervenors named in the first decree to rescind, as vigorously as it could.

Consequently, the exchanging stockholders *were* before the court contesting the right of the intervenors named in the decree to rescind and they were not entitled to individual notice and had no right to assume that the adverse rights of those who sought rescission would or could be exercised for their benefit or protection.

Since it appears that the Trust Company stockholders were not indispensable or even proper parties to the suit, they were not and could not have been entitled to be made parties to that suit or entitled to have any of their alleged rights foreclosed. The indispensable parties defendant were both before the court actively contest-

ing all of the matters litigated, which fact affirmatively appears upon the face of the decree.

Therefore, if, as asserted, the decree did exceed the scope and the purpose of the suit as indicated by the pleadings, the presumption should be indulged that an amendment of the pleadings was made to conform the pleadings to the evidence.

Reynolds vs. Stockton, 140 U. S. 254, 266.

It is the duty of the Court to indulge this presumption to avoid a destruction of property rights and to avoid an impairment of the stability of judicial decrees.

It necessarily results that the decree of February 27, 1913, was not and is not void, from which it follows that the District Court was wholly without power or jurisdiction to vacate that decree after the expiration of the term at which it was granted.

(2) It is further respectfully submitted that the decision here complained of is erroneous in that in effect it permits individuals named in the petition of intervention of July 15, 1913, to exercise the remedy of rescission after the insolvency of the Trust Company after the rights of your petitioners herein have been fixed and settled by the decree of February 27, 1913, and after the rights of creditors of the Trust Company have supervened, all of which rights are injuriously affected by the decision in question and in this connection your

attention to the case of Scott vs. Abbott, 160 Fed. 573, petitioners respectfully beg leave to direct the Court's 580, 582 and Marks vs. Merrill Paper Co., 203 Fed. 16, 19, in which the United States Circuit Court of Appeals for the Eighth Circuit decided that stockholders should not be permitted to exercise the remedy of rescission after the occurrence of the events herein specified.

(3) Your petitioners further allege that this learned Court erred in failing to give effect to the order of Circuit Judge Morrow made April 14, 1913, which sustained a demurrer to the petition in intervention dated April 5, 1913.

Your petitioners allege that this decision of Judge Morrow constituted and was the law of the case and as such was binding upon the District Court in the District of Arizona as constituted on March 12, 1914.

And your petitioners respectfully allege that in the event that this learned Court denies their application for rehearing your petitioners desire to apply to the Supreme Court of the United States for a certiorari to review and revise the errors here complained of.

In this connection, your petitioners respectfully allege that in the event rehearing is denied the petitioners will base its application to the Supreme Court of the United States for certiorari upon the authority, among others, of the case of McClellan vs. Carland, 217 U. S. 268 and upon the case of William Cramp Sons vs. Cur-

tis Turbine Co., 228 U. S. 645, and that such application will be based upon the contention that an imperative necessity exists for the issue of the writ of certiorari for the protection of your petitioners' rights herein in that it is the only means of redress which your petitioners have to correct an excess of jurisdiction in the court below in vacating after the term at which it was rendered a valid final decree in equity to the prejudice of your petitioners and also because the vacation of such decree constitutes error of so grave a character involving considerations of such public importance as to cause it to be the duty of the Supreme Court of the United States to review and revise the proceedings by certiorari and also because the decision of this learned Court here complained of presents a conflict of adjudication and decision between this court and the United States Circuit Court of Appeals for the Eighth Circuit as disclosed by the case of Scott vs. Abbott, 160 Fed. 573 and Marks vs. Merrill Paper Co., 203 Fed. 16.

Wherefore, your petitioners respectfully pray for the vacation of the order, judgment or decree dismissing your petitioners' application for mandamus herein and that thereupon a preemptory writ may issue herein as prayed for in your petitioners' petition for mandamus or in the alternative that the issue of the mandate herein may be stayed for a reasonable time after the decision of this motion to enable your petitioners to apply to the Supreme Court of the United States for a certiorari to

bring up to that court the record herein for review and correction.

Your petitioners as in duty bound will ever pray.

WILLIAM M. SEABURY,

Solicitor for Petitioners,

Fleming Block,

Phoenix, Arizona.

CERTIFICATE OF COUNSEL.

As counsel for the petitioners herein, I respectfully certify that in my judgment the grounds and reasons recited in the foregoing petition for rehearing of the above entitled cause and for the other relief prayed for are well founded and I further certify that this petition for rehearing is not interposed for delay.

WILLIAM M. SEABURY,

Solicitor for Petitioners.

Dated March 8, 1915.

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